In the

United States Court of Appeals

For the Seventh Circuit

No. 12108

RICHARD KOSLEY,
Plaintiff-Appellee,

v.

GOLDBLATT BROS., INC., a corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

Honorable
Luther M. Swygert,
Presiding Judge.

BRIEF AND APPENDIX FOR APPELLANT.

STANFORD CLINTON,
134 North La Salle Street, A.-7
Chicago, Illinois.

ROBERT A. SPRECHER,
100 West Monroe Street,
Chicago, Illinois.

CHARLES LEVIN,
5231 Hohman Avenue,
Hammond, Indiana.

Attorneys for Defendant-Appellant.

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INDEX.

PAGE

Statement of Facts 1

Summary of Argument 4

The Contested Issues 5

Propositions of Law Relied Upon 5

Argument:

I. Section 301 of the Labor Management Relations Act of 1947 and Section 3 of the United States Arbitration Act require the reversal of the District Court 8

II. Principles of contract law as applied in the State of Indiana require the reversal of the District Court 12

Authorities Cited.

Cases.

Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U. S. 437 (1955) ..8, 13

Bohlinger v. National Cash Register Co., 305 N. Y. 539, 114 N. E. 2nd 31 (1953) 18

Brady Transfer & Storage Co. v. Local 710, International Brotherhood of Teamsters, 22 CCH Lam. Cas. 67,121 (N. D. Ill., 1952) 11

Donahue v. Susquehanna Collieries Company, 138 F. 2d 3 (3rd Cir., 1943) 10

Fargo v. Reighard, 13 Ind. App. 39, 39 N. E. 888 (1895) 15

General Electric Company v. Local 205, United Electrical, Radio and Machine Workers of America, 77 S. Ct. 921 (1927) 11

Goodall-Sanford, Inc. v. United Textile Workers of America, 77 S. Ct. 920 (1957) 11

Grand Rapids & I. R. Co. v. Jaqua, 66 Ind. App. 113, 115 N. E. 73 (1917) 15

Jones v. Mississippi Valley Barge Line Co., 98 F. Supp. 787 18

Kelley v. Adams, 120 Ind. 340, 343, 22 N. E. 317 (1889) 15

Lake Michigan Water Company v. U. S. Fidelity Co., 70 Ind. App. 537, 542, 123 N. E. 703 (1919) 16

Lewittes & Sons v. United Furniture Workers, 95 F. Supp. 851 (S. D. N. Y., 1951) 10

Lincoln Mills of Alabama v. Textile Workers Union, 230 F. 2d 81 (1956) 10

Maitland v. Reed, 37 Ind. App. 469, 77 N. E. 290 (1905) 15, 16

Memphis Trust Co. v. Brown-Ketchum Iron Works, 166 Fed. 398 (6th Cir., 1909) 16

Microflex Products Co., Inc. v. Rosenthal, 80 N. Y. S. 2nd 788 18

Miller v. Goodwine, 29 Ind. 46, 47 (1867) 15

P. S. Thorsen & Co., Inc. v. Neves, 179 Misc. 11, 37 N. Y. S. 2nd 113 18

Signal-Stat Corporation v. U. E. Workers of America, 235 F. 2d 298 (2nd Cir., 1956) 10

Smith v. Stewart, 5 Ind. 220 (1854) 15

Supreme Council of the Order of Chosen Friends v. Forsinger, 125 Ind. 52, 55, 25 N. E. 129 (1890) 15

Tenney Engineering, Inc. v. United Electrical Workers Local 437, 207 F. 2d 450 (3rd Cir., 1953) 11

Textile Workers Union of America v. Lincoln Mills of Alabama, 77 S. Ct. 912 (1957) 9, 11

Transcontinental & Western Air, Inc. v. Koppal, 345 U. S. 653 (1953) 17

United Office & Professional Workers v. Monumental Life Ins. Co., 88 F. Supp. 602 (E. D. Pa., 1950) 11

Webb v. Zeller, 70 Ind. 408, 410 (1880) 15

Wilson & Co. v. Fremont Cake & Meal Co., 77 F. Supp. 364 (D. Neb., 1948) 10

Statutes.

Section 301, Labor Management Relations Act, 29 U. S. C. § 185 8

United States Arbitration Act, 9 U. S. C. § 1 ff.:

Sec. 1 10

Sec. 2 9

Sec. 3 10

Burns, Indiana Statutes Annotated (1946 Replacement Volume) § 3-201 15

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APPELLANT'S BRIEF.

STATEMENT OF FACTS.

The plaintiff, Richard Kosley, was employed by the defendant, Goldblatt Bros., Inc., as an engineer from 1939 to November 1, 1955, on which date he was discharged (App., 15-6). On September 15, 1956, the plaintiff brought this action against the defendant to recover wages claimed to be due during the period from July 1, 1947 to October 29, 1955 (App., 1, 2), on the ground that collective bargaining agreements between the defendant and the union of which the plaintiff was a member provided that all hours worked in excess of forty hours per week were to be paid at the

hourly rate of time and one-half and that, during this period, the plaintiff was not so paid (App., 36, 39, 44, 48, 52, 56, 60, 64 and 68).

Commencing July 20, 1947, and during each year thereafter, there was in force a collective bargaining contract between Local No. 846, International Union of Operating Engineers and the defendant, Goldblatt Bros., Inc., covering the terms and conditions of employment of the members of that union as employees, and the defendant, as employer. The plaintiff was a member of the union (App., 18, 24-29). Each contract contained substantially the following provision (App., 38, 41, 45, 49, 53, 57, 61, 65 and 69):

> "It is hereby agreed that there shall be no strikes, lockouts, stoppages or the use of any economic coercion during the term of this agreement. *It is hereby agreed that any dispute, controversy or question arising under this agreement which can not be settled by discussion and negotiation between the parties shall be submitted to arbitration* and each party hereto shall select one arbitrator, and the two shall select a third. In the event the arbitrators designated by the parties can not agree upon the third arbitrator, then the Department of Conciliation of the United States Department of Labor is hereby authorized to appoint the third arbitrator. The arbitrators thus appointed shall meet within six days and the decision of the majority of the arbitrators shall be conclusive upon both parties hereto." (Emphasis added.)

On May 1, 1957, Charles Levin, one of the attorneys for the defendant, addressed a letter to Arthur L. Brookman, President of Local No. 846 of the International Union of Operating Engineers, stating that a dispute over wages had arisen between the plaintiff and the defendant and requesting that the dispute be submitted to arbitration in accordance with the arbitration provisions. The letter further stated that the defendant had appointed Stanford Clinton of Chicago, Illinois as one arbitrator, and requested

the union to appoint another (Deft. Ex. 1; App., 71). There was enclosed with the letter an agreement for submission to arbitration (Deft. Ex. 2; App., 6-7).

The request for arbitration was granted and the agreement for submission was signed by the defendant and the union (Deft. Ex. 2; App., 6-7). Frank Rebey was appointed as an arbitrator by the union. The two arbitrators appointed then selected Judge Frank A. J. Stodola as an umpire (Deft. Ex. 3; App., 7). On May 21, 1957, a letter was addressed to George Kohl, the attorney for the plaintiff, by Charles Levin, stating that pursuant to the terms of the union contract, the defendant desired to arbitrate the dispute between itself and the plaintiff and that an agreement had been signed submitting the matter to arbitration. The letter enclosed a copy of the agreement for arbitration and stated that a hearing would be held in the courtroom of the City Hall in Hammond, Indiana on May 27, 1957 (App., 5).

The plaintiff thereupon filed his petition for a restraining order, ancillary to this action, wherein he sought to restrain the defendant, its agents, servants, and employees from engaging in any arbitration proceeding (App., 2-4). Following a hearing (App., 12-36), a restraining order was entered enjoining the defendant, its agents, servants and employees from directly or indirectly taking any further action in the proposed arbitration proceedings (App., 8-9). This appeal is from the restraining order (App., 9).

SUMMARY OF ARGUMENT.

I.

The Supreme Court of the United States has held that Section 301 of the Labor Management Relations Act of 1947 expresses a federal policy in favor of the enforcement of agreements to arbitrate grievance disputes such as the one involved in the present case. Section 3 of the United States Arbitration Act requires that federal courts stay judicial proceedings until arbitration proceedings are completed. In view of this overwhelming expression of congressional policy in favor of arbitration, the federal district court clearly erred in restraining arbitration proceedings in the present case.

II.

Ordinary principles of contract law applicable in the State of Indiana hold that the arbitration provision in a contract is binding upon parties thereto because it constitutes consideration for the wage and hour and other provisions in the same contract, that a party may not rely on parts of a contract and ignore other parts of the same contract, and that the arbitration agreement is a condition precedent to suing upon the contract and until the arbitration remedies provided in the contract are exhausted no judicial proceeding will lie.

THE CONTESTED ISSUES.

I.

Does a federal district court have the power or jurisdiction under federal law to enjoin a proceeding to arbitrate a grievance dispute?

II

Does a federal district court have the power or jurisdiction under the law applicable in the State of Indiana to enjoin a proceeding to arbitrate a grievance dispute?

PROPOSITIONS OF LAW RELIED UPON

I.

Section 301 of the Labor Management Relations Act of 1947 and Section 3 of the United States Arbitration Act Require the Reversal of the District Court.

Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U. S. 437 (1955).

Textile Workers Union of America v. Lincoln Mills of Alabama, 77 S. Ct. 912 (1957).

Signal-Stat Corporation v. U. E. Workers of America, 235 F. 2d 298 (2nd Cir., 1956).

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Lewittes & Sons v. *United Furniture Workers*, 95 F. Supp. 851 (S. D. N. Y., 1951).

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Tenney Engineering, Inc. v. *United Electrical Workers Local 437*, 207 F. 2d 450 (3rd Cir., 1953).

Goodall-Sanford, Inc. v. *United Textile Workers of America*, 77 S. Ct. 920 (1957).

General Electric Company v. *Local 205, United Electrical, Radio and Machine Workers of America*, 77 S. Ct. 921 (1957).

II.

Principles of Contract Law as Applied in the State of Indiana Require the Reversal of the District Court.

Lake Michigan Water Company v. U. S. Fidelity Co., 70 Ind. App. 537, 542, 123 N. E. 703 (1919).

Maitland v. Reed, 37 Ind. App. 469, 77 N. E. 290 (1905).

Bohlinger v. National Cash Register Co., 305 N. Y. 539, 114 N. E. 2nd 31 (1953).

Association of Westinghouse Salaried Employees v. *Westinghouse Electric Corporation*, 348 U. S. 437 (1955) at 440.

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Burns, Indiana Statutes Annotated (1946 Replacement Volume). § 3-201.

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Webb v. *Zeller*, 70 Ind. 408, 410 (1880).

Miller v. *Goodwine*, 29 Ind. 46, 47 (1867).

Supreme Council of the Order of Chosen Friends v. *Forsinger*, 125 Ind. 52, 55, 25 N. E. 129 (1890).

Grand Rapids & I. R. Co. v. *Jaqua*, 66 Ind. App. 113, 115 N. E. 73 (1917).

Memphis Trust Co. v. *Brown-Ketchum Iron Works*, 166 Fed. 398 (6th Cir., 1909).

Transcontinental & Western Air, Inc. v. *Koppal*, 345 U. S. 653 (1953).

P. S. Thorsen & Co. Inc. v. *Neves*, 179 Misc. 11, 37 N. Y. S. 2nd 113.

Microflex Products Co., Inc. v. *Rosenthal*, 80 N. Y. S. 2nd 788.

Jones v. *Mississippi Valley Barge Line Co.*, 98 F. Supp. 787.

ARGUMENT.

I.

Section 301 of the Labor Management Relations Act of 1947 and Section 3 of the United States Arbitration Act Require the Reversal of the District Court.

The record in this appeal does not disclose the basis of federal jurisdiction but the action of the District judge in restraining the proposed arbitration proceeding is erroneous regardless of the plaintiff's ground for invoking federal jurisdiction.

If the plaintiff's complaint was brought in the federal District Court in reliance upon Section 301 of the Labor Management Relations Act of 1947, 29 U. S. C. § 185, which provides in part that

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties * * *."

then the District Court clearly lacked jurisdiction in the present case and its restraining order must be vacated because the Supreme Court of the United States held in *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437 (1955) that

> "There was no suggestion that Congress, at a time when its attention was directed to congestion in the federal courts, particularly in the heavy industrial areas, intended to open the doors of the federal courts to a potential flood of grievances based upon an employer's failure to comply with terms of a collective agreement relating to compensation, terms peculiar

in the individual benefit which is their subject matter and which, when violated, give a cause of action to the individual employee. The employees have always been able to enforce their individual rights in the state courts * * * Therefore, we conclude that Congress did not confer on the federal courts jurisdiction over a suit such as this one [to recover compensation under a collective bargaining agreement in favor of individual employees for absences from work]." (Pages 460-1).

Furthermore, if the District Court possessed jurisdiction over the present case, it would be bound by Section 2 of the United States Arbitration Act, 9 U. S. C. § 2 (Supp. V, 1952) which provides that a written provision "in any maritime transaction or a contract evidencing a transaction involving commerce" calling for arbitration of disputes arising thereunder shall be valid, irrevocable and enforceable save upon the grounds which exist for the revocation of any contract. Finally, the Supreme Court of the United States has held in *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 77 S. Ct. 912 (1957) that Section 301 of the Labor Management Relations Act of 1947 "expresses a federal policy that federal courts should enforce these agreements [to arbitrate grievance disputes] on behalf of or against labor organizations and that industrial peace can be best obtained only in that way" and that "the congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes * * * [is] clear * * *" Thus if the plaintiff in the present case is relying upon the federal jurisdiction conferred by Section 301, such jurisdiction does not include this kind of case and if it did, the District Court was bound by clear mandate to recognize the agreement to arbitrate and it erred in restraining the proposed arbitration.

On the other hand, if jurisdiction is founded upon diversity of citizenship and sufficient amount in controversy,

the District Court's order is equally erroneous, although for other reasons.

Section 3 of the United States Arbitration Act, 9 U. S. C. § 3 (Supp. V, 1952) provides:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Section 3 applies to any suit brought in a federal court, whether upon a federal question or upon diversity of citizenship, since it derives its authority, not from federal jurisdiction over foreign and interstate commerce, but from federal power to regulate procedure in federal courts. *Wilson & Co.* v. *Fremont Cake & Meal Co.*, 77 F. Supp. 364 (D. Neb., 1948); *Lewittes & Sons* v. *United Furniture Workers*, 95 F. Supp. 851 (S. D. N. Y., 1951). Obviously, if a federal District Court is bound to stay judicial proceedings in favor of arbitration proceedings, it lacks the power or jurisdiction to restrain arbitration proceedings in favor of judicial proceedings. *Signal-Stat Corporation* v. *U. E. Workers of America*, 235 F. 2d 298 (2nd Cir., 1956); *Donahue* v. *Susquehanna Collieries Company*, 138 F. 2d 3 (3rd Cir., 1943); *Wilson & Company* v. *Fremont Cake & Meal Company*, 77 F. Supp. 364 (Neb., 1948); *Lincoln Mills of Alabama* v. *Textile Workers Union*, 230 F. 2d 81 (1956).

Although Section 1 of the United States Arbitration Act, 9 U. S. C. § 1 (Supp. V, 1952) provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or to any other class of work-

ers engaged in foreign or interstate commerce," the Act applies to the present case for any one of three reasons: (1) several courts have held that the proviso in Section 1 of the Act does not apply to Section 3 of the Act; *United Office & Professional Workers* v. *Monumental Life Ins. Co.*, 88 F. Supp. 602 (E. D. Pa., 1950); *Brady Transfer & Storage Co.* v. *Local 710, International Brotherhood of Teamsters*, 22 CCH Lab. Cas. ¶ 67,121 (N. D. Ill., 1952); (2) several courts have held that a collective bargaining agreement is not a contract of employment; see *United Office* and *Brady* cases, *supra; Lewittes & Sons* v. *United Furniture Workers*, 95 F. Supp. 851 (S. D. N. Y., 1951); and (3) several courts have held that a "class of workers engaged in foreign or interstate commerce" covers only workers engaged in foreign or interstate transportation: *Tenney Engineering, Inc.* v. *United Electrical Workers Local 437*, 207 F. 2d 450 (3rd Cir., 1953).

In concluding that the United States Arbitration Act applies to labor grievances, Professor Cox, in an article entitled "Grievance Arbitration in the Federal Courts," in 67 Harvard Law Review 591 (1954), said:

> "The result is sound if there is a labor policy to which the courts should give effect favoring the enforcement of agreements to arbitrate grievances."

Since he spoke, the Supreme Court of the United States has conclusively held that there is such a policy. *Textile Workers Union* v. *Lincoln Mills of Alabama*, 77 S. Ct. 912 (1957); *Goodall-Sanford, Inc.* v. *United Textile Workers of America*, 77 S. Ct. 920 (1957); and *General Electric Company* v. *Local 205, United Electrical, Radio and Machine Workers of America*, 77 S. Ct. 921 (1957).

II.

Principles of Contract Law as Applied in the State of Indiana Require the Reversal of the District Court.

But even if neither the Labor Management Relations Act of 1947 nor the United States Arbitration Act applies to the present case, the District Court erred in restraining the arbitration proceeding. The plaintiff's sworn petition for the restraining order stated that his complaint was filed for wages due him from the defendant covering the period from July 1, 1947 to October 29, 1955 and "that said wages *were due by various contracts* which had been executed by the defendant, Goldblatt Bros., Inc., and The International Union of Operating Engineers Local No. 846-A of which plaintiff was a member during said time" (App., 2). The plaintiff testified that his claim was for wages due to him "by virtue of the various written contracts" between the defendant and the plaintiff's union (App., 13); that he personally never had a contract with the defendant and as a union man was not allowed to make personal contracts with the employer (App., 18); and that all of the conditions of his employment were contained in the collective bargaining agreements, which constituted the basis of his claim (App., 18).

During the period covering the plaintiff's claim, there were nine collective bargaining agreements in effect between the defendant and the plaintiff's union (Pltfs. Exs. 2, 3, 4, 5, 6, 7, 8, 9 and 10; App., 36, 39, 43, 47, 51, 55, 59, 63 and 67). Each agreement provided for specific wages and hours (App., 36, 39, 44, 48, 52, 56, 60, 64 and 68) and each agreement contained substantially the following provision (App., 38, 41, 45, 49, 53, 57, 61, 65 and 69):

> "It is * * * mutually agreed by and between the parties * * * that *any dispute, controversy or question arising under this agreement* which cannot be settled

by discussion and negotiation *shall be submitted to arbitration.* Each party hereto shall select one arbitrator and the two shall select a third. In the event the arbitrators designated by the parties cannot agree upon the third arbitrator, then the Department of Conciliation of the United States Department of Labor is hereby authorized to appoint the third arbitrator. The arbitrators thus appointed shall meet within six days and the decision of the majority of the arbitrators shall be conclusive upon both parties hereto." (Emphasis added.)

Although ordinarily a collective bargaining agreement is not an individual contract of employment but it "obligates the employer to include in the contracts of hire with each employee the terms and conditions which had been settled between the union and the employer" (*Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corporation*, 348 U. S. 437 (1955) at 440), in the present case the nine collective bargaining agreements each covered only two to four employees, including the plaintiff (App., 24-5), the plaintiff entered into no separate contract of employment (App., 18) and in a very real sense the collective bargaining agreement also constituted the contract of employment. The importance of permitting the union to arbitrate individual grievances with the employer instead of allowing the individual employee affected to do so was set forth in *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437 (1955) at pages 457-8:

> "Perhaps the prime example of an individual cause of action, as distinguished from a union cause * * * would be the case of the discharge of a single employee. To make the situation vivid, assume that there is no dispute whatever as to the propriety of the alleged ground for the discharge and the only matter in controversy is the question of fact whether the employee did or did not commit the offense alleged.

> Yet precisely such incidents often pull the trigger of work stoppages. When stoppages do occur, they most frequently involve a grievance with respect to one employee or a few employees much smaller in number than those involved in the stoppage. That such stoppages are wildcat and officially unauthorized merely emphasizes the fact of group interest in the incident. * * * A legal rule denying standing to the union to protect individual rights under what is deemed a contract with individuals would encourage such indiscipline. * * * There is in fact a strong group interest in procuring for the employee the benefit promised as well as the promise in the collective agreement. If the union can represent and press that group interest, the stoppage may be avoided; if it cannot, the group resorts to wildcat self-help."

The president of the plaintiff's local union expressed the group interest in the plaintiff's grievance as follows (App., 21):

> "Well, an engineer cannot walk off on a boiler, like other crafts can walk out of a shop, and by having an arbitrating clause in grievances we continue working. We know it will be settled in three months, six months. It is retroactive. Our men are still on the job, and we are not out. That's the reason for the clause in our contracts."

Despite the trial court's unprovoked and obvious hostility toward the president of the plaintiff's local union (App., 26-28), the president testified that the union would "fight for" the plaintiff's rights in the arbitration proceedings (App., 29).

Thus the collective bargaining agreements in the present case actually constituted the plaintiff's contracts of employment or, at the very least, the plaintiff's contracts embodied and incorporated all of the terms and conditions of the collective agreements, including the arbitration clause, which the union, as well as the employer, had an

interest in preserving. Assuming that neither the Labor Management Relations Act of 1947 nor the United States Arbitration Act apply to this case, ordinary principles of contract law as applied in the State of Indiana, where the contracts were performed (see App., 36, 39, 43, 47, 51, 55, 59, 63 and 67) require that the restraining order of the District Court be reversed.

Indiana has declared that it favors the process of arbitration and it accords to an award the status of a judgment of a court. *Smith* v. *Stewart*, 5 Ind. 220 (1854); *Fargo* v. *Reighard*, 13 Ind. App. 39, 39 N. E. 888 (1895). Although the Indiana statute, Burns Indiana Statutes Annotated (1946 Replacement Volume) § 3-201, which provides in part:

> "All persons * * * may, by an instrument in writing, submit to the arbitration or umpirage of any person or persons, to be by them mutually chosen, any controversy existing between them which might be the subject of a suit at law * * *."

applies to existing disputes only, the statute expresses a public policy favoring arbitration and it is cumulative to the common law. *Kelley* v. *Adams*, 120 Ind 340, 343, 22 N. E. 317 (1889); *Webb* v. *Zeller*, 70 Ind. 408, 410 (1880); *Miller* v. *Goodwine*, 29 Ind. 46, 47 (1867). At common law, an agreement whereby the parties bind themselves to submit a future dispute to arbitration is not illegal. *Supreme Council of the Order of Chosen Friends* v. *Forsinger*, 125 Ind. 52, 55, 25 N. E. 129 (1890); *Maitland* v. *Reed*, 37 Ind. App. 469, 77 N. E. 290 (1905). Although the parties to a common law arbitration may revoke their submission at any time prior to the rendering of an award, *Grand Rapids & I. R. Co.* v. *Jaqua*, 66 Ind. App. 113, 115 N. E. 73 (1917), the right to revoke is subject to ordinary principles of contract law and revocation is permissible only in cases where the promise to arbitrate is not supported by con-

sideration. If the arbitration clause is part of the consideration of the contract as a whole, as it was in the present case, as opposed to a separate agreement to arbitrate, then under Indiana law it is clearly not revocable. In *Lake Michigan Water Company* v. *U. S. Fidelity Co.*, 70 Ind. App. 537, 542, 123 N. E. 703 (1919), the court said:

> "[A] provision in a building contract by which an architect or engineer becomes the arbitrator is, if anything, more binding than an ordinary submission to arbitration for the reason that *it becomes a part of the consideration of the contract.*"

In *Memphis Trust Co.* v. *Brown-Ketchum Iron Works*, 166 Fed. 398 (6th Cir., 1909), the court said at page 403:

> "It is, however, now too well settled to admit of controversy that provisions in a building contract such as exist here, by which a given architect is expressly clothed with the broad authority to determine finally all matters in dispute under the contract, and by which final settlement is to be had and payments made upon architects' certificates, do not create a mere naked agreement to submit differences to arbitration. Nor are such provisions for arbitration merely collateral to and independent of the other provisions of the contract; but they are, on the other hand, of its very essence, and such agreement is not subject to revocation by either party, but actual or tendered compliance with the terms of the contract is a necessary condition precedent to recovery upon it; and an award made by virtue of such contract provision, in the absence of fraud or of such gross mistake as would imply bad faith or a failure to exercise honest judgment, is binding upon both parties thereto, so far as it is confined to disputes actually subsisting and open to arbitration."

In *Maitland* v. *Reed*, 37 Ind. App. 469 (1905), the court said at page 470:

> "The parties might properly agree that any controversy or dispute arising under the contract should

> be submitted for determination to the architect, and it must be shown that such a condition precedent was performed before bringing suit * * *."

The Indiana authorities are similar to Missouri cases discussed in a recent decision of the Supreme Court of the United States. In *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653 (1953), the employee had been employed in accordance with the terms of a collective bargaining agreement which provided for a specified grievance procedure culminating in arbitration. The employee did not pursue the procedure outlined in the collective contract but instead brought suit in the federal District Court, claiming diversity of citizenship and seeking damages for wrongful discharge. The Supreme Court held that the case should be dismissed, stating at page 660:

> "Under the law of Missouri, as shown above, respondent was required to show exhaustion of administrative remedies under his employment contract in order to sustain his cause of action."

Thus under principles of contract law, the plaintiff in the present case cannot sue upon the part of his contract fixing wages and hours and ignore the part providing for arbitration of disputes; each part of the employment contract is consideration for every other part and no part is revocable by one party; and the arbitration agreement was a condition precedent to suing upon the contract and until the remedies provided in the contract are exhausted no action can lie.

There can be no doubt that the arbitration provision in the various collective bargaining agreements covered the grievance which is the subject-matter of the plaintiff's claim for additional compensation. The contracts provide that "*any dispute, controversy or question arising under this agreement which cannot be settled by discussion and negotiation between the parties shall be submitted to*

arbitration." The president of the local union which was a party to the agreements and of which the plaintiff was a member, testified in regard to the arbitration provision (App., 21-2):

> "Q. Did it cover situations like this, between Goldblatt's and Mr. Kosley?
>
> A. Yes, it would have, if he would have filed a grievance with the union.
>
> Q. In other words, if Mr. Kosley had filed a grievance with the union and they couldn't settle this thing, why, it would have been submitted to arbitration?
>
> A. That's right."

Therefore, not only is the language of the contract clear that "any dispute" should be submitted to arbitration, but the testimony of one of the parties discloses that this particular dispute should be submitted to arbitration.

Individual grievances relating to the payment of wages are always held to be subject to arbitration provisions in collective bargaining agreements. *P. S. Thorsen & Co., Inc.* v. *Neves*, 179 Misc. 11, 37 N. Y. S. 2nd 113; *Microflex Products Co., Inc.* v. *Rosenthal*, 80 N. Y. S. 2nd 788; *Jones* v. *Mississippi Valley Barge Line Co.*, 98 F. Supp. 787. In each of these cases, the courts stayed judicial proceedings commenced by the employee to recover wages in order that arbitration proceedings be concluded.

In *Bohlinger* v. *National Cash Register Co.*, 305 N. Y. 539, 114 N. E. 2nd 31 (1953), the employer discharged two employees covered by the collective bargaining agreement on the ground that while on the employer's payroll they had worked for a company in competition with the employer during their off-hours. The employer resisted a demand for arbitration, asserting that the dismissal of the

employees was a matter outside of the terms of the collective bargaining agreement and therefore not subject to arbitration. When the union persisted in its demand for arbitration, the employer obtained an injunction restraining the proposed arbitration. On appeal, the lower court was reversed. The arbitration clause in the agreement provided that "any dispute" shall be referred to arbitration. The court said at page 32 (N. E. 2nd):

> "The clause in controversy, it is plain, contemplated the submission to arbitration not only of the terms, interpretation and application of the collective bargaining agreement itself, but also any dispute which might arise in respect of matters not provided for in the agreement. There can be no claim of ambiguity in the language chosen to express what the parties intended; nor does it appear that the language agreed upon failed to express that intention. The failure to allude specifically to every possible area of dispute should not result in making an arbitration clause unworkable where the parties have specifically said that it was their intention to include 'any dispute * * * with reference to any matter not provided for in this contract.' "

Where a collective bargaining agreement such as the one in the present case contains an arbitration provision, all grievances and matters that arise as a result of the agreement must be submitted to arbitration and therefore it was error for the court below to have granted an injunction restraining arbitration procedings.

As a matter of fact, the court below upon application of either party, was under a duty to stay the judicial proceedings and to compel specific performance of the arbitration agreement.

Therefore, the order of the court below granting the injunction should be reversed and the cause remanded.

Respectfully submitted,

STANFORD CLINTON,
134 North La Salle Street,
Chicago, Illinois,

ROBERT A. SPRECHER,
100 West Monroe Street,
Chicago, Illinois,

CHARLES LEVIN,
5231 Hohman Avenue,
Hammond, Indiana,
Attorneys for Defendant-Appellant.

INDEX.

Statement Pursuant to Rule 16(b) 1
Petition for Restraining Order 2
Order 8
Notice of Appeal 9
Bond for Costs on Appeal 10

TRANSCRIPT OF PROCEEDINGS.

Testimony of:
Kosley, Richard 13
Brookman, Arthur L. 19
Plaintiff's Exhibit No. 2 36
Plaintiff's Exhibit No. 3 39
Plaintiff's Exhibit No. 4 43
Plaintiff's Exhibit No. 5 47
Plaintiff's Exhibit No. 6 51
Plaintiff's Exhibit No. 7 55
Plaintiff's Exhibit No. 8 59
Plaintiff's Exhibit No. 9 63
Plaintiff's Exhibit No. 10 67
Defendant's Exhibit No. 1 71

APPENDIX.

5 UNITED STATES DISTRICT COURT,

Northern District of Indiana,

Hammond Division.

Richard Kosley
vs.
Goldblatt Bros., Inc., a corporation. } Hammond Civil 2075.

STATEMENT PURSUANT TO RULE 16(b).

Complaint in the above case was filed September 15, 1956. Defendant filed answer on October 9, 1956. Plaintiff filed petition for restraining order on May 24, 1957. On June 14, 1957 hearing was held on plaintiff's petition for restraining order. Parties were present by counsel and evidence heard. The court granted restraining order. On June 19, 1957, signed restraining order was entered by Judge Luther M. Swygert. On July 2, 1957, notice of appeal, from the court's order of June 19, 1957, was filed, together with designation and bond on appeal.

Kenneth Lackey,
Clerk.

By Jean Erickson,
Deputy.

6 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—2075) * *

PETITION FOR RESTRAINING ORDER.

Comes now the plaintiff, Richard Kosley, and states as follows:

1. That on September 15, 1956, his complaint was filed herein for wages due him from the defendant covering the period from July 1, 1947 to October 29, 1955, and that said wages were due by various contracts which had been executed by the defendant, Goldblatt Bros., Inc., and The International Union of Operating Engineers Local No. 846-A of which plaintiff was a member during said time, and that each of said contracts provided in substance,

> "It is hereby agreed that there shall be no strikes, lockouts, stoppages or the use of any economic coercion during the term of this agreement. It is hereby agreed that any dispute, controversy or question arising under this agreement which cannot be settled by discussion and negotiation between the parties shall be submitted to arbitration and each party hereto shall select one arbitrator and the two shall select a third. In the event the arbitrators designated by the parties cannot agree upon the third arbitrator, then the Department of Conciliation of the United States Department of Labor is hereby authorized to appoint the third arbitrator. The arbitrators thus appointed shall meet within six days and the decision of the majority of the arbitrators shall be conclusive upon both parties hereto."

2. That during the period of time for which plaintiff claims back wages he personally made demands upon his Union representative as well as upon the defendant's
7 agents for said back wages and no action of any kind

was taken upon said demands nor were said demands ever submitted to arbitration.

3. That said arbitration clause is applicable only to a situation wherein the International Union of Operating Engineers Local No. 846-A and Goldblatt Bros., Inc. have a dispute arising out of said agreements, and would not apply to a situation where as heretofore stated plaintiff had on numerous occasions prior to filing suit made grievance both to the said Local Union and the defendant and no action was taken, and further, said provision could not conflict with provisions of Burns Indiana Statute 40-101, 102, which provide in part as follows:

> "Every person, firm, corporation or association, their trustees, lessees or receivers appointed by any court whatsoever doing business in this state shall pay each employee thereof at least twice each month, if requested, between the first and tenth and between the fifteenth and twenty-fifth of each month inclusive, the amount due such employee and such payment shall be made in the lawful money of the United States or by negotiable check, draft or money order and *any contract to the contrary shall be void.*"

4. On May 22, 1957, the plaintiff's attorney, George Kohl, received a notice that said claim was to be submitted to arbitration, a copy of which notice is attached hereto marked Exhibit "A" and incorporated herein by reference, and that said arbitration proceeding is in direct conflict with this Federal Court's jurisdiction over the matter in controversy and if said arbitration proceeding is had it would deprive the plaintiff of his constitutional rights to a trial before a judicial tribunal and would be an encroachment upon the jurisdiction of this court, and that the defendant is seeking to determine the issues raised in this law suit by a non-judicial body.

8 Wherefore, plaintiff prays that the defendant, Goldblatt Bros., Inc. be enjoined, restrained and prohibited by this court from taking any further proceedings in said arbitration and for all other proper relief in the premises.

Nowicki, Raskosky & Kohl,
By George Kohl,
Attorneys for Plaintiff,
5129 Hohman Avenue,
Hammond, Indiana.

State of Indiana, } ss.
County of Lake. }

Richard Kosley, being first duly sworn, upon his oath deposes and says that he has read the above and foregoing petition for restraining order and the facts contained therein are true in substance and in fact as he is informed and verily believes.

Richard Kosley.

Subscribed and sworn to before me this 23rd day of May, 1957.

George Kohl,
(Seal) *Notary Public.*

My commission expires Oct. 15, 1958.

The undersigned hereby acknowledges receipt of a copy of plaintiff's petition for restraining order and a copy of proof of notice, and he is hereby advised that a hearing on said petition for restraining order shall be had before the Honorable Luther M. Swygert, Judge of the United States District Court for the Northern District of Indiana at the Federal Court House in Fort Wayne, Indiana at 9:00 A. M. on May 24, 1957.

Dated this 22nd day of May, 1957.

Charles Levin,
Attorney for Defendant.

9 Exhibit "A".

Charles Levin
Attorney at Law
5231 Hohman Avenue
Hammond, Indiana
Telephone WEstmore 3-7700

May 21, 1957.

Mr. George Kohl
c/o Nowicki, Raskosky & Kohl
Attorneys at Law
5129 Hohman Avenue
Hammond, Indiana

In re: Richard Kosley -vs-
Goldblatt Bros., Inc.
Civil No. 2075

Dear Mr. Kohl:

Reference is made to the above captioned matter.

The testimony of the discovery deposition of your client, taken on February 20th, 1957, disclosed that the above captioned suit was by virtue of a contract entered into by the International Union of Operating Engineers, Local 846 and Goldblatt Bros., Inc.

Reference to this contract disclosed that any disputes which arose under the contract were to be settled by arbitration, and that each party was to name an arbitrator, and the two arbitrators were to name an umpire. Accordingly, I notified Mr. Arthur L. Brookman, President of the Union, that Goldblatt Bros. desired to arbitrate this matter, and that they named Stanford Clinton as their arbitrator. I submitted this to Mr. Brookman, who named Frank Rebey as the arbitrator selected by the Interna-

tional Union of Operating Engineers, Local No. 846. This was done on May 10th, 1957, a copy of the agreement being herewith enclosed.

The arbitrators then selected Judge Frank A. J. Stodola as the umpire, a copy of which Selection is also herewith enclosed.

10 I have notified Judge Stodola that we would like to have a hearing on the matter, and accordingly a hearing has been set for Monday, May 27th, 1957 at 10:30 a. m. at the courtroom in the City Hall of Hammond, Indiana.

At that time, I would appreciate your presenting your case, and we will present ours; and the matter can thus be decided.

Very truly yours,

Charles Levin,

Attorney at Law.

CL:DC

11 Agreement for Submission to Arbitrators.

It Is Hereby Agreed by and between Goldblatt Bros., Inc., party of the first part, and International Union of Operating Engineers, Local No. 846, party of the second part, whose names are hereto subscribed, each for themselves, that whereas the parties hereto have disagreed as to the amount of a claim made by Richard Kosley, a member of the International Union of Operating Engineers, Local No. 846, against the party of the first part for overtime wages alleged to be due him for the period beginning July 1st, 1947 to October 29th, 1955, inclusive, while he was employed by the party of the first part in the store of the party of the first part in Hammond, Indiana.

Now, Therefore, the party of the first part hereby selects Stanford Clinton, as arbitrator and the party of the second part hereby selects Frank Rebey as arbitrator. Said

arbitrators shall together first select a competent and disinterested umpire who shall then determine the claim of the party of the second part, if any. The award of any two, in writing, shall determine the claim hereby submitted for arbitration.

Each arbitrator shall be paid by the party selecting him, and the expense and service of the umpire shall be paid for by the parties hereto equally.

The arbitrator shall determine:

1. The existence of a claim by the party of the second part against the party of the first part.
2. If such claim exists, the amount thereof.

Signed and Dated this 10 day of May, 1957.

Goldblatt Bros., Inc.
By: (Illegible),
Asst. Secretary.
International Union of Operating Engineers, Local No. 846.
By: Arthur L. Brookman,
President.

12 Selection of Umpire.

We, the undersigned, hereby select and appoint Judge Frank A. J. Stodola to act as umpire to settle matters of difference that shall exist between us, if any, by reason of and in compliance with the foregoing agreement and appointment.

Witness our hands this 15th day of May, 1957.

Stanford Clinton,
Arbitrator.
Frank Rebey,
Arbitrator.

Award.

To the Parties Interested:

We have heard the evidence in the matter before us, in accordance with the foregoing appointment, and have determined the claim of Richard Kosley to be as follows:

Award . . . . . $.....

Witness our hands this ..... day of ....., 1957.

.....

Arbitrator.

.....

Arbitrator.

.....

Umpire.

13 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—2075) * *

ORDER.

This cause having come on for trial this 14th day of June, 1957, upon plaintiff's verified petition for restraining order, the court having heard the evidence and being duly advised in the premises finds for plaintiff on his said petition for restraining order. In accordance with the findings of fact and conclusions of law announced by the court from the bench at the close of trial on said date,

It Is Hereby Ordered And Adjudged As Follows:

The defendant and the defendant's agents, servants and employees are hereby enjoined and restrained from directly or indirectly taking any further action in the

proposed arbitration proceedings set forth in plaintiff's petition for restraining order until further order of court.

Dated this 19 day of June, 1957.

Luther M. Swygert,
Judge.

Notice sent to: Nowicki, Raskosky & Kohl
Kenneth Call
Charles Levin

14 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Indiana,

Hammond Division.

Richard Kosley,
Plaintiff,
vs.
Goldblatt Bros., Inc., a corporation,
Defendant.
} Cause No. 2075

NOTICE OF APPEAL.

Goldblatt Bros., Inc., a corporation, Defendant herein, hereby gives notice that they appeal to the United States Court of Appeals for the Seventh Circuit from this Court's order dated the 19th day of June, 1957, wherein the Court restrained the Defendant, their agents, servants and employees from directly or indirectly taking any further action in the proposed arbitration proceedings set forth in the Plaintiff's Petition for a Restraining Order.

Stanford Clinton,
Charles Levin,
Attorneys for Defendant.

19 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—2075) * *

BOND FOR COSTS ON APPEAL.

Know all men by these presents, that we, Goldblatt Bros., Inc. as principal, and The Maryland Casualty Company of Baltimore, Maryland as sureties, are held and firmly bound unto Richard Kosley in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said Richard Kosley, his successors, executors, administrators and assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, by these presents.

Sealed with our seals and dated this 2nd Day of July, 1957.

Whereas, on the 19th day of June, 1957, in an action pending in the United States District Court for the Northern District of Indiana, Hammond Division, between Richard Kosley as plaintiff and Goldblatt Bros., Inc. as defendant, a restraining order was issued against Goldblatt Bros., Inc. and the said Goldblatt Bros., Inc. filed a notice of appeal from such restraining order to the
20 United States Circuit Court of Appeals for the Seventh Circuit.

Now, the conditions of this obligation are such, that if the said Goldblatt Bros., Inc. shall prosecute their appeal to effect and shall pay costs if the appeal is dismissed or the restraining order affirmed or such costs as the said Circuit Court of Appeals may award against the said Goldblatt Bros., Inc. if the restraining order is modified

or in any other event, then this obligation to be void; otherwise to remain in full force and effect.

Goldblatt Bros., Inc.
By George Bruski,
Asst. Treas.
Principal

(Seal

Maryland Casualty Company
By Allan F. O'Rourke,
Attorney-in-fact.
Surety

(Seal

30 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—2075) * *

Record of proceedings in the above entitled cause of action before the Honorable Luther M. Swygert, United States District Judge, on the 14th day of June, 1957, at 1:30 o'clock P.M., at Hammond, Indiana.

Appearances:

George Kohl, Esq., of Hammond, Indiana, representing the plaintiff;

Charles Levin, Esq., of Hammond, Indiana, representing the defendant.

31 The Court: Mr. Kohl?

Mr. Kohl: May it please the Court, we are over here this afternoon on a petition for a restraining order against the defendant in Cause No. 2075 from proceeding with an arbitration of the very cause that is involved in this dispute, and I would like to introduce some evidence to support our petition.

I think that some of the things we can stipulate to.

As to paragraph 1, Mr. Levin, can we stipulate that each of the contracts contained this provision?

Mr. Levin: Yes, or substantially that.

Mr. Kohl: The plaintiff was employed under certain written contracts, each of which provided substantially as set out in paragraph 1.

And can we stipulate as to paragraph 4 in the plaintiff's petition for restraining order, wherein we allege that we received the attached notices and arbitration forms?

Mr. Levin: Yes.

Mr. Kohl: Mr. Kosley, will you be sworn?

32 RICHARD KOSLEY, plaintiff in said cause of action, and a witness in his own behalf, having first been duly sworn, testified as follows:

Direct Examination by Mr. Kohl.

Q. Your name is Richard Kosley, is it not?

A. Yes, sir.

Q. You are the plaintiff in this case, Cause No. 2075, against Goldblatt Bros., Incorporated; is that right?

A. Yes, sir.

Q. That claim involves wages due you by virtue of various written contracts covering the period of 1947 through 1955; is that correct?

A. Yes, sir.

Q. Now, Mr. Kosley, during the time that you were employed by Goldblatt's, had you ever notified either the defendant or your union representatives of this wage demand which you have?

A. Yes, I have.

Q. Who did you notify?

A. Well, the business representative of the union, Mr. Stephen Stevens.

33 Q. When did you first notify Mr. Stevens?

A. That was about three years after I started there.

Q. What year would that be?

A. 1945, I believe it was.

Q. Did you ever notify him after that?

A. After that, on several occasions, yes.

Q. What did you tell Mr. Stevens?

A. I told Mr. Stevens that we were working more hours than we were getting paid for, according to the contract, and he said, "Just keep on doing it until we straighten it out".

Q. The thing you told him is what your claim for wages is based on in this lawsuit?

A. It is.

Q. Was any action ever taken by Mr. Stevens?

A. There doesn't seem to have been any action taken.

Q. Mr. Stevens was the business representative of International Union of Operating Engineers Local No. 846?

A. Right.

Q. Did you ever notify the defendant about this wage claim that you had?

34 A. Yes, I have.

Q. Who did you notify?

A. The superintendent on the job, Mr. Dall.

Q. When did you first notify Mr. Dall?

A. That was in approximately '49 or '50.

Q. And was any action taken by Mr. Dall?

A. No action was taken.

Q. What was Mr. Dall's position?

A. He was superintendent of the store.

Q. Of Goldblatt Bros., Inc.?

A. Yes, sir.

Q. Mr. Kosley, do you want to submit your claim to arbitration?

A. No, I don't.

Q. You want to submit it to the Court; is that right?

A. That's right.

Q. If there are any arbitration clauses in these contracts which were made for your benefit, do you revoke those arbitration clauses?

A. I revoke those clauses, yes.

Q. Do you know who Mr. Stanford Clinton is?

A. I understand he is Goldblatt's lawyer.

Q. He is the lawyer who took your conditional

35 examination; is that right?

A. Yes, sir.

Q. And he has been appointed one of the arbitrators here; is that right?

A. That's right.

Q. Were you given an opportunity or consulted in the appointment of these arbitrators?

A. No, I wasn't.

Q. When was the first notice you had that this was being submitted to arbitration?

A. I don't know when that was. That was probably a month ago.

Q. Who told you about it?

A. I believe you did.

Q. And the arbitrators had already been selected?

A. They were already selected.

Q. Did the International Union of Operating Engineers, Local No. 846, consult you relative to the selection of arbitrators here?

A. No, they haven't.

Mr. Kohl: That is all.

36 *Cross Examination by Mr. Levin.*

Q. Mr. Kosley, when did you start working for Goldblatt Bros.?

A. Back in 1939.

Q. When were you discharged?

A. In 1955, November 1st.

Q. So that your period of employment covered about sixteen years?

A. Or more, yes.

Q. This claim for wages, however, is for a period of only eight years, is that correct, or seven years, rather?

A. It could be, yes.

Q. Well, is it?

A. For the whole period of time that I worked there, yes.

Q. How long a period of time does your suit in this court for back wages cover?

Mr. Kohl: I am going to object, your Honor. The complaint speaks for itself. This man probably doesn't know exactly the dates that have been alleged in the complaint.

The Court: How is that material?

37 Mr. Levin: Well, I think that he ought to know what his claim is for, why he is here, and what this case is about.

The Court: Well, of course, the general nature of it, but exact details, I am wondering. After all, it is not the trial.

Mr. Kohl: He testified that it is the same controversy that is being sought to be arbitrated. I think that is all the further—

The Court: Without being bound, so that—

Mr. Levin: I don't seek to bind him in his lawsuit, if he has one, by his testimony.

The Court: Generally, do you know how far back, over what period, your claim covers in this lawsuit?

The Witness: From the day I started working there, in 1939, or thereabouts. I understand there is a statute that limits the number of years that you can go back into, so I wouldn't know the answer.

By Mr. Levin:

Q. Mr. Kosley, the nature of your claim is that
38 it covers allegedly overtime pay that you say is due you?

Mr. Kohl: I am going to object to this line of questioning, as going to the merits of the lawsuit.

Mr. Levin: We will connect it up in a moment, your Honor, if we are given an opportunity.

The Court: Well, the claim would indicate that.

Is that what you are suing for, for time and a half for the hours which were more than you should have worked, under the law?

The Witness: Yes, sir.

By Mr. Levin:

Q. And there is a nice dispute as to whether or not you have got that coming; isn't that right?

Mr. Kohl: I am going to object to that, your Honor, as calling for a conclusion, a nice dispute.

The Court: Well, you made a claim?

The Witness: Yes, sir.

The Court: And they denied it?

39 The Witness: Yes, your Honor.

By Mr. Levin:

Q. So that is the dispute which we seek to submit to arbitration; isn't that correct?

A. I don't know your mind.

Q. You personally never had a contract with Goldblatt Bros. for employment, did you?

Mr. Kohl: I am going to object to that, as calling for a legal conclusion. There is a contract made on his behalf. How can he testify as to the legal efficacy of a written contract?

Mr. Levin: Will you read that question again, please? (Question read.)

The Court: Well, what do you mean, individual contract?

Mr. Levin: Individual contract.

The Court: Do you mean a written contract?

Mr. Levin: Written or oral.

The Court: It might be quite an undertaking, to answer that.

40 Mr. Levin: He can state whether or not he had a specific agreement with Goldblatt Bros. as to the hours of his employment and the conditions of his employment.

The Witness: I can answer that.

Mr. Levin: Then answer it.

The Witness: I was not allowed to make any contracts because I was a union man; I never was allowed to make personal contracts with the employer.

By Mr. Levin:

Q. You personally never had a contract, did you?

A. Personally no.

Q. So that your claim in this court and in this case arises out of the contract made by your union, of which you were a member at the time; isn't that true?

A. I should have worked according to the contract, and I was not paid according to the contract, yes.

Q. Your claim, therefore, arises out of the union contract made by your union and signed between the officers of your union and the principals of Goldblatt Bros.; isn't that correct?

41 A. Based on that, yes.

Q. And all of the conditions of your employment are set forth in that contract, aren't they, the time, the hours, and rate of pay?

A. They should be, yes.

Q. How is that?

A. They should be, and they were.

Q. They were. And this clause for arbitration was and is contained in that contract, isn't it?

Mr. Kohl: If you know.

A. I don't know.

By Mr. Levin:

Q. You don't know?

A. I don't know what you are referring to in the contract.

Q. We are talking about the union contract; you understand that, don't you?

A. I understand that.

Q. You have seen the contract, haven't you?

A. Yes, I have.

Q. And there is an arbitration clause in that contract, isn't there?

A. I don't know. There probably is. I don't know. I haven't read it that carefully.

42 Mr. Levin: I think that is all, your Honor.

(And thereupon the witness was excused.)

Mr. Kohl: The plaintiff rests his case, your Honor.

And thereupon the defendant, to support and maintain the issues on its behalf, introduced the following evidence:

Mr. Levin: Mr. Brookman, will you take the stand, please?

ARTHUR L. BROOKMAN, a witness on behalf of the defendant, having first been duly sworn, testified as follows:

Direct Examination by Mr. Levin.

Q. Will you state your name, please?

A. Arthur L. Brookman.

Q. What is your trade or occupation?

A. Operating engineer.

Q. You hold an office in a union, I believe it is known as International Teamsters Union?

A. International Union of Operating Engineers, Local 846, president and business manager.

43 Q. How long have you held that position?

A. I have held the presidency about twelve years, and the business representative, five.

Q. Are you familiar with a dispute that is going on between the plaintiff in this case, Richard Kosley, and Goldblatt Bros.?

A. Am I familiar with it?

Q. Yes.

A. No, I am not.

Q. Was any claim or demand made upon you by Richard Kosley at any time covering his dispute with Goldblatt Bros.?

A. Well, do you mean in regard to the contract or—

Q. In regard to his personal claim.

A. No, he has not contacted me.

Q. Did he ever talk to you about it?

A. No.

Q. Are you familiar with the contract or the several contracts that have been entered into between the union and Goldblatt Bros.?

A. I am.

Q. Covering the working conditions of operating engineers?

A. I am.

Q. Did you sign all of them, or most of them?

44 A. I think I have approved most of them since 1947, although I didn't negotiate from '47 to '52. Stevens negotiated those contracts.

Q. But you were the president?

A. I was the president.

Q. And you signed them?

A. I signed them.

Q. Were you familiar with the contents of the contract?

A. I was.

Q. Were you in contact with Stevens as he negotiated these contracts?

A. I think I was with him on the negotiations once, but I wouldn't remember the year, and the other times he negotiated and brought the contracts to me, to read and approve.

Q. And they were read and approved by you?

A. That's right.

Q. Now, in each of the contracts was substantially this clause, "that any dispute, controversy or question arising under this agreement which cannot be settled by discussion and negotiation between the parties shall be submitted to arbitration and each party hereto shall select one arbi-
45 trator and the two shall select a third."

It makes arrangements for selecting arbitrators, one to be appointed by Goldblatt's, one by the union, and the two so appointed appointing a third.

Do you know whether or not that clause was contained in all of the contracts that were signed by you during your incumbency as president of this union?

A. To the best of my knowledge, it is in all of our contracts. It's our "no strike" clause.

Mr. Kohl: I am going to object to that conclusion, your Honor, as to what his interpretation of the clause is.

I don't think it is material.

The Court: Well, overruled.

By Mr. Levin:

Q. What was the purpose of having that clause in the agreement, Mr. Brookman?

A. Well, an engineer cannot walk off on a boiler, like other crafts can walk out of a shop, and by having an arbitrating clause in grievances we continue working.
46 We know it will be settled in three months, six months.

It is retroactive. Our men are still on the job, and we are not out. That's the reason for the clause in our contracts.

Q. Was it to cover disputes between the operating engineers, members of your union, and the employer?

A. Any member of the union working for that employer. It covers the employer who he works for.

Q. Did it cover situations like this, between Goldblatt's and Mr. Kosley?

A. Yes, it would have, if he would have filed a grievance with the union.

Q. In other words, if Mr. Kosley had filed a grievance with the union, and they couldn't settle this thing, why, it would have been submitted to arbitration?

A. That's right.

Q. Mr. Brookman, I sent you a letter on May 1st, which you received and returned to me. Is that the letter (indicating) which you got?

A. Yes.

Q. And this letter set forth this entire clause contained in the contract, and said that Kosley had filed a claim against Goldblatt Bros., and that we disputed the
47 claim, that he was a member of your union, and that we wanted to arbitrate it. We named an arbitrator, and asked you to name one.

Is that correct?

A. That is correct.

Mr. Levin: We offer this in evidence.

(Said instrument was marked Defendant's Exhibit 1.)

The Court: You are offering it?

Mr. Levin: Yes, your Honor.

We would like to offer a photostat, with your Honor's permission.

Mr. Kohl: I have no objection.

The Court: Admitted.

(And thereupon DEFENDANT'S EXHIBIT 1 was admitted in evidence.)

By Mr. Levin:

Q. Now, Mr. Brookman, I also in that letter enclosed an agreement for submission to arbitrators. I hand you what is a photostatic copy of that agreement, which you executed.

Do you recognize your signature?

A. Yes, that is my signature.

Q. And you did execute this agreement for arbitration?

48 A. That's right.

Q. And in this agreement you nominated Frank Rebey as the arbitrator for the union; is that correct?

A. That is correct.

Q. And then Mr. Rebey and Mr. Clinton got together and they selected Judge Frank A. J. Stodola as the third arbitrator or umpire.

Were you familiar with that proceeding?

A. Somebody told me. I don't remember who it was.

Mr. Levin: We offer in evidence the agreement and the selection.

Mr. Kohl: No objection. They are attached to my petition.

(Said instruments were marked Defendant's Exhibits 2 and 3, for identification.)

The Court: Admitted.

(And thereupon DEFENDANT'S EXHIBITS 2 AND 3 were admitted in evidence.)

By Mr. Levin:

Q. The purpose of this entire procedure and this agreement was in accordance with the terms and conditions of the contract that you and the business agent of your

49 union negotiated on behalf of the union with Goldblatt Bros.; is that correct?

Mr. Kohl: I am going to object to that, your Honor. He is asking him if this selection was in accordance with the contract.

The Court: Well, I think that might be a legal conclusion.

Mr. Kohl: He is asking him if it was in accordance. Our position is that the minute we filed the lawsuit this

arbitration agreement was revoked. I have cases to support that.

He is asking this man if their selection was in accordance with the contract.

The Court: I assume that he means whether the procedure of getting the arbitrators named was, in his opinion, in accordance with the provisions of the contract as to how the arbitrators were to be selected.

Is that what you are asking him?

Mr. Levin: Yes. I wanted to establish that the
50 entire procedure taken was in accordance with the terms, at least, in his understanding.

The Court: In so far as getting an arbitration?

Mr. Levin: Yes.

Mr. Kohl: No objection.

He just testified how they selected them.

The Court: Well, in your opinion, was it done in the way that the contract provided, when matters were to be submitted for arbitration?

The Witness: That's right.

Mr. Levin: That is all.

Cross-Examination by Mr. Kohl.

Q. Mr. Brookman, when these various contracts which you testified to were made, they were made on Mr. Kosley's behalf, were they not?

A. Of all of the employees of Goldblatt Bros.

Q. How many engineers do you have over there at Goldblatt's?

A. Four.

51 Q. Four of them?

A. That's included in that contract; two in the Gary store, and two in the Hammond store.

Q. Were there four of them back in 1947?

A. Well, that I don't remember. Stevens was the business agent at that time.

Q. In so far as the Hammond store, your contract was made on behalf of Mr. Kosley and possibly one other engineer; is that right?

A. Well, the contract covers both stores. We negotiate both stores at the same time.

Q. There are four employees altogether now?

A. That's right.

Q. Therefore, any provisions in this contract would be for Mr. Kosley's benefit; is that right?

A. Well, I think the provisions would all be for his benefit.

Q. That's right. And if any of these provisions are revocable, Mr. Kosley would have the right to revoke them, wouldn't he?

Mr. Levin: Well, that is a conclusion. We object to it.

The Court: Sustained.

By Mr. Kohl:

52 Q. The contract was made for Mr. Kosley's benefit; you acted more or less as his agent in making this contract; is that correct?

A. That is correct.

Q. Did you notify Mr. Kosley, when you were notified of this proposed arbitration?

A. No, I didn't, because Mr. Kosley is out of the Union, with a withdrawal card, and the contract is between the Union and Goldblatt's, and we think that the Union should protect itself.

If Mr. Kosley would have contacted us—

Q. Well, you didn't answer my question. Did you notify him? You can answer that yes or no.

A. No, I didn't notify him. I don't know where to notify him.

Q. He had nothing to do with the selection of this Mr. Rebey?

A. Not a thing.

Q. But you did testify that the contract was made solely for Mr. Kosley's benefit, did you not?

A. No, I did not. I said it was made for four engineers, in the Gary and Hammond stores.

Q. He was one of the engineers for whom it was made?

53 A. It wasn't solely for him; it was for the other fellows, too.

Q. For the engineers?

A. That's right.

Q. Did Mr. Kosley at any time ever discuss his wage claim with you?

A. Never.

Q. Do you know if he ever discussed it with Mr. Stephen Stevens?

A. No, I do not.

Q. You don't know that?

A. No, sir.

Mr. Kohl: I think that is all, your Honor.

Redirect Examination by Mr. Levin.

Q. Just one question: The contract did provide for the working hours, rate of pay, what was time and a half, and overtime, and all that sort of thing, didn't it?

A. All fringes, time and a half, overtime, the hours of work, what constituted a week's work, 40 hours, that's all contained in the contract.

54 Mr. Levin: That is all.

By the Court: Q. In this arbitration, are you representing Mr. Kosley?

The Witness: I am representing the Union.

By the Court: Q. You are not representing him?

The Witness: He has never asked me to.

By the Court: Q. Well, in this arbitration, I am just asking you; you say you are representing the Union; are you representing him?

The Witness: As far as the Union is concerned, yes.

By the Court: Q. Are you representing his individual interests? You can answer that yes or no.

The Witness: Well, I don't know what his individual interests are.

By the Court: Q. Are you, or are you not? You answer that, will you, please?

The Witness: Well, we will.

By the Court: Q. Are you representing his
55 claim?

The Witness: I don't know how to take it.

By the Court: Q. You answer that, will you, please?

The Witness: His claim?

By the Court: Q. This dispute is over his claim, isn't it?

The Witness: Well, I am not familiar with that.

By the Court: Q. Well, what is this arbitration for?

The Witness: Well, I suppose it's on his overtime.

By the Court: Q. All right. Are you representing him in this case?

The Witness: As far as the Union, yes.

By the Court: Q. Are you representing him? Now, you answer that.

The Witness: Well, I don't just understand just how you mean that.

By the Court: Q. Well, you know whether you are defending his claim, or not.

The Witness: Well, the Union—

56 By the Court: Q. Are you defending his claim individually? Now, you answer that.

The Witness: Am I, individually?

By the Court: Q. I don't mean you, individually; I mean you, as a representative of the Union.

The Witness: Well, yes.

By the Court: Q. You are going to try to get his money for him?

The Witness: If he has got it coming, we will try to get it for him, yes. We will represent him; we are ready to represent him.

By the Court: Q. Well, why didn't you say so?

The Witness: I thought you meant am I personally representing him.

The Court: You knew what I meant.

The Witness: No, I didn't. I didn't understand your question at all. No, he is still under the Union's jurisdiction in an arbitration.

By the Court: Q. So you are going to try to get his money for him?

57 The Witness: If we get what it is. We have never been notified; we don't know anything that—

By the Court: Q. Have you been out to see him?

The Witness: No.

By the Court: Q. Has he asked you to represent him?

The Witness: No.

By the Court: Q. How do you undertake to represent him, then?

The Witness: Well, we got to go by the contract, and if there's any violations there—

By the Court: Q. Who started this arbitration?

The Witness: Well, I don't know.

By the Court: Q. Did you?

The Witness: No.

By the Court: Q. Then why are you in it?

The Witness: Because we were asked, as a Union, to pick an arbitrator.

By the Court: Q. Who asked you?

The Witness: Goldblatt's wanted to arbitrate
58 it.

By the Court: Q. Who started the arbitration?

The Witness: Well, I suppose Goldblatt's; I don't know. But the employer has the right, just as much the right, under our contract, to arbitrate as the Union does.

By the Court: Q. How about the man?

The Witness: The man is part of the Union.

By the Court: Q. Is he a part of your Union?

The Witness: Yes, sir.

By the Court: Q. I thought that he was out of it.

The Witness: He has taken a withdrawal card, but as far as his rights under the contract back when he was working, he is still covered; he would still be covered back to '47 under Stevens, under the contract. He has only been out since '55.

By the Court: Q. Are you going to this arbitration, are you going to say that he has something coming, or what?

59 The Witness: I will say just what I have said here.

By the Court: What?

The Witness: I don't know what he has got coming. I would have to talk to Kosley. I don't know what Kosley's problem is; I have never talked with him.

By the Court: Q. Then how are you going to represent him?

The Witness: The only thing that I can represent him is that the contract calls for time and a half after forty hours, and that's what he is entitled to, if I know his hours; that's what I will fight for.

The Court: All right.

Recross Examination by Mr. Kohl.

Q. When you got this letter dated May 1st from Mr. Levin, did you notify Mr. Kosley?

A. No, I did not.

Q. You never have talked to Mr. Kosley about this claim?

A. I have not.

Mr. Kohl: That is all, your Honor.

60 Mr. Levin: That is all, Mr. Brookman.

(And thereupon the witness was excused.)

Mr. Kohl: Are you through, Mr. Levin?

Mr. Levin: Yes; the defendant rests.

Mr. Kohl: Just to clear up the record, your Honor, I want to introduce in evidence this letter that I received setting this matter for arbitration on Monday, June 17th, 1957, at 10 A.M., at the courtroom in the City Hall, Hammond, Indiana.

Is that correct, Mr. Levin?

Mr. Levin: Yes.

(Said instrument was marked Plaintiff's Exhibit 1, for identification.)

The Court: Admitted.

(And thereupon PLAINTIFF'S EXHIBIT 1 was admitted in evidence.)

Mr. Kohl: And, also—

The Court: You better stick around here Mr. Brookman; you better stay around here; you are under subpoena now.

Mr. Kohl: And, also, possibly for the record, your
61 Honor, I didn't want to burden the record with these various contracts; we just set out the one clause.

Could we stipulate that the contract attached to the answers to the interrogatories can be incorporated in the record by reference, the entire contract?

Mr. Levin: Yes. And I have them all here, and they all contain that clause, or substantially that.

Mr. Kohl: I mean, can we stipulate that the entire contracts be incorporated in the record, rather than sit here and read probably fifty different pages of contracts?

Mr. Levin: Well, I don't want to make a big record.

The Court: Well, what are you talking about, the things that are in this record?

Mr. Levin: He wants the entire contract made a part of this record.

The Court: You mean that is in this file?

Mr. Kohl: That is in the answers to the interrogatories.

62 The Court: Well, it is here, isn't it?

Mr. Kohl: Well, your Honor, do we have to incorporate the contracts in the record? What I was getting at, your Honor, we just introduced the arbitration clause here, but I think that, for record purposes, we should have the contracts in evidence.

The Court: Isn't that (indicating) what you are talking about?

Mr. Kohl: Yes.

The Court: Well, it is in the file.

Mr. Kohl: That's what I mean. Can we incorporate the contracts in the answers to the interrogatories into the record in this proceeding, without reading them?

The Court: You mean, to stand here and read them?

Mr. Kohl: No; that's what I don't want.

Mr. Levin: The thing is, I don't want that entire contract to be a part of this record in case this has to go up. I mean, I think the clause itself is sufficient, just the arbitration clause.

You don't need the entire contract, do you, Mr.

63 Kohl?

Mr. Kohl: Well, I don't think so, but I think it would

make it clearer, if it went up; it would certainly make the record clearer on appeal.

Mr. Levin: Well, it doesn't make any difference to me.

The Court: If it is to be appealed, the whole file will go up as an original record, anyway.

Mr. Kohl: We can just stipulate that this clause was taken out of the contracts that were filed with their answers to the interrogatories.

The Court: But you are offering the entire contract?

Mr. Kohl: The entire contracts that were attached to the answers to the interrogatories.

The Court: Admitted.

(Said instruments were marked PLAINTIFF'S EXHIBITS 2, 3, 4, 5, 6, 7, 8, 9, and 10, for identification, and were admitted in evidence.)

64 Mr. Kohl: With that, your Honor, we rest our case.

Mr. Levin: That is our case.

(And this was all of the evidence given in said cause.)

* * * * *

85 The Court: Well, I am ready to make a decision in this case. There was one thing that I did want to ask before I announced my decision. I would like to ask Mr. Brookman a question. You may just sit there, Mr. Brookman.

Is Mr. Kosley presently a member of the Union?

Mr. Brookman: Indirectly yes.

The Court: What do you mean by "indirectly"?

Mr. Brookman: Well, he is out on a withdrawal

86 card. He can come in, be reinstated at any time.

The Court: He is not an active member?

Mr. Brookman: He is not an active member.

The Court: Did he withdraw from the Union, or was he discharged from the Union?

Mr. Brookman: No, he withdrew.

The Court: He is not a dues-paying member presently?

Mr. Brookman: That's right, at the present time.

The Court: He is not working as a union member, that you know of?

Mr. Brookman: Not that I know of.

The Court: Not for Goldblatt's, or anyone else, that you know of?

Mr. Brookman: Well, I don't know where he is working.

The Court: But at least he is not working as a union member?

Mr. Brookman: That is correct.

The Court: Thank you.

There is some persuasion, at least to some extent, or
87 some logic to the position that if this is an illegal arbitration, and if the plaintiff here is not consenting, but protesting, regardless of what goes on, he is not bound by it; that it would be a matter of indifference to him, as long as he indicates his protest, and he is certainly doing that by asking for this restraining order. That is one way of indicating his disagreement with the plan of submitting his dispute with Goldblatt Bros. to an arbitration procedure. Whatever happens, whether it is restrained or not restrained, he is taking the position that he is not bound by it.

And if it is an illegal procedure, to which he is not consenting, then I would assume that whatever would happen at the arbitration proceeding would have no effect, and could not be set up as a defense in the instant action in this court.

But before I finally decide that question, I think that sometimes this question arises in a different posture, where one of the parties to a suit in court between an employer and employee, usually the employer, moves to stay the
88 litigation in court until time is given for arbitration, or says that the court action is premature until the

arbitration is completed. I think there are some cases arising in that fashion. In fact, I had a situation of that kind in Fort Wayne recently, where the employer asked to stay the court action until arbitration had been completed. I denied the request, and cited a case, *United States v. Voges*, 124 F. Supp. 543, in support of my conclusion that the motion to stay should not be granted.

This contract is between the employer, Goldblatt Bros., and the International Union of Operating Engineers. It seems to me, as is evident from the answers given by the Union representative who testified here, that this is not a dispute between the Union and Goldblatt Bros., but it is a dispute between Mr. Kosley, an individual, and Goldblatt Bros.

Query: Doesn't this arbitration clause apply to disputes arising between the Union, as such, and the employer, Goldblatt Bros., over wages, hours, working conditions, and so forth? Isn't that what this arbitration clause
89 has to do with? Does it have anything to do with the individual dispute of an employee, particularly a discharged employee, with the employer, even though that dispute may be governed by a contract between the Union and the employer, of which he is a third party beneficiary?

Certainly the evidence here would indicate that the Union is taking a very strange position, I should say, in so far as representing the individual interests and claim of Mr. Kosley, the plaintiff, not notifying him about the arbitration, he not seeking arbitration, but the Union, nevertheless, assuming to act for and on his behalf—ostensibly.

I think that this arbitration agreement has to do with disputes of a general nature between the Union and employees in their capacity as Union members, and as a group, and the employer, as distinguished from any dispute which an employee may have as an individual with his employer, so I am of the view that this suit should go

forward. There is no motion to stay it and await
90 arbitration, substitute arbitration for it.

My real difficulty is whether or not a restraining order should be granted, since whatever happens, under the view that I have just expressed, would be of no consequence legally. But if it were subsequently held that arbitration were the proper procedure, and he did not show up to protect his interests at the arbitration proceeding, it might be to his disadvantage; or if he did show up, even though under protest, it might be held that he consented to the arbitration procedure; so I believe that it would be entirely proper for the Court to enter this restraining order during the pendency of this action in court.

And because one of the parties to the arbitration procedure is a party litigant in this action, the Court has a right to exercise its injunctive powers over that party with regard to other litigation arising out of the same subject matter and dealing with the identical dispute, so for that reason the restraining order is granted.

91 I would request counsel to submit, after consultation with each other, a form of restraining order that would be consistent with my findings and my conclusions.

Mr. Levin: May I request that the actual entry of the order be made after the form is presented and approved?

The Court: Yes; the clerk should not make an entry until after you have consulted with each other regarding the form. If you can't agree to it, you may submit the matter to me for decision.

I understand, by your consultation about the form, that you are not, of course, necessarily in accord with the Court's decision, by that act.

Mr. Levin: No, I do not acquiesce.

The Court: I understand.

How soon do you think you could have the order prepared?

Mr. Kohl: Probably the first part of next week, unless Mr. Levin and I can get together and try to agree on a
92 form of order. As soon as we do, I will have it typed up and bring it over.

The Court: All right, within the next few days.

(And thereupon court was adjourned.)

96 PLAINTIFF'S EXHIBIT NO. 2.

This Agreement made and entered into this 20th day of July, 1947, by and between Goldblatt Bros., Inc., hereinafter referred to as the "Employer", and The International Union of Operating Engineers, Local No. 846-A, hereinafter referred to as the "Union";

Witnesseth:

Section 1. The Employer hereby agrees to employ only Apprentice and Operating Engineers who are members in good standing in the Union and who are employed by the Employer in the Cities of Hammond and Gary, Indiana.

Section 2. The Employer agrees to pay Operating Engineers $1.85 per hour and Apprentice Engineers $1.50 per hour, on the basis of eight consecutive hours per day and of a work week of forty hours. All time worked more than eight consecutive hours on any work day or more than forty hours in any work week shall be paid at the hourly rate of time and one-half.

Section 3. Employees covered hereby who have been in the continuous employ of the Employer from one year up to two years shall receive one week's vacation with pay, and those who have been in the continuous employ of the Employer for more than two years shall receive two weeks' vacation with pay. Vacations shall be in accord with the company's policy.

Section 4. Employees covered hereby shall be entitled

to the following holidays with pay: New Year's Day, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day, provided the employees work the day before and the day after the holiday. In the event the employee works on any of the aforesaid holidays, he shall be entitled to double time.

Section 5. The Union hereby agrees that its members shall obey any authorized representative of the Em-
97 ployer in performing the work required, and conduct themselves in respectful manner, and work in every way to the best interest of their Employer.

Section 6. The duties of the Apprentice and Operating Engineers shall be confined to the operation and care of all boilers, pumps, ventilating fans, and all refrigeration, and all other machinery properly belonging to the Engineers Jurisdiction of the Operating Engineers. The Operating Engineers shall make the necessary repairs in maintaining their equipment that can properly be expected of the Engineers.

Section 7. The Union hereby agrees to furnish qualified Apprentice and Operating Engineers to perform the work required by the Employer, and the Employer has the right to make such rules and regulations as may be necessary to perform the work required of the Apprentice and Operating Engineers, providing that they do not conflict with the terms of this agreement or with the jurisdictional limitations of the Union.

Section 8. The Employer hereby agrees to employ one Operating Engineer and One Apprentice Engineer at the Gary store and also at the Hammond store.

Section 9. The Employer shall have the right to discharge an employee for just cause. Just cause shall consist of dishonesty, drunkenness, absenteeism, insubordination, theft and inefficiency. The Employer hereby agrees that when desiring to dispose of the services of any em-

ployee not satisfactory to the Employer, to give two weeks' notice in writing, or to pay two weeks' salary in lieu thereof. No notice shall be required to be served upon employees for dishonesty or drunkenness.

Section 10. It is hereby agreed that there shall be no strikes, lockouts, stoppages or the use of any economic coercion during the term of this agreement. It is
98 hereby agreed that any dispute, controversy or question arising under this agreement which cannot be settled by discussion and negotiation between the parties shall be submitted to arbitration and each party hereto shall select one arbitrator and the two shall select a third. In the event the arbitrators designated by the parties cannot agree upon the third arbitrator, then the Department of Conciliation of the United States Department of Labor is hereby authorized to appoint the third arbitrator. The arbitrators thus appointed shall meet within six days and the decision of the majority of the arbitrators shall be conclusive upon both parties hereto.

Section 11. This contract is to be in force and binding upon both parties hereto from the 20th day of July, 1947 to the 20th day of July, 1948, and from year to year thereafter, unless either party shall notify the other in writing within sixty days prior to July 20, 1948, or at least within sixty days prior to July 20th in any subsequent year, of the termination thereof.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

Goldblatt Bros., Inc.,
By Joel Goldblatt, (Seal)
President.

The International Union of Operating Engineers, Local No. 846-A,
By Arthur L. Brookman (Seal)
Pres.
Ford McColly (Seal)

99 PLAINTIFF'S EXHIBIT NO. 3.

This Agreement made and entered into as of the 20th day of January, 1949, by and between Goldblatt Bros., Inc., hereinafter referred to as the "Employer", and The International Union of Operating Engineers, Local No. 846-A, hereinafter referred to as the "Union":

Witnesseth:

Section 1. The Employer hereby agrees to employ only Apprentice and Operating Engineers who are members in good standing in the Union and who are employed by the Employer in the cities of Hammond and Gary, Indiana.

Section 2. The Employer agrees to pay Operating Engineers $2.00 per hour and Apprentice Engineers $1.65 per hour. The regular work day shall consist of eight (8) hours and the regular work week of forty (40) hours. All time worked more than eight (8) hours in any work day or more than forty (40) hours in any work week shall be paid at the hourly rate of time and one-half. Employees covered hereby shall take one-half (½) hour without pay to eat during each eight (8) hour shift.

Section 3. Employees covered hereby who have been in the continuous employ of the Employer from one year up to two years shall receive one week's vacation with pay, and those who have been in the continuous employ of the Employer for more than two years shall receive two weeks' vacation with pay. Vacations shall be in accord with the company's policy.

Section 4. Employees covered hereby who have been employed continuously for a minimum of thirty (30) days shall be entitled to the following holidays with pay: New Year's Day, Decoration Day, Fourth of July, Labor 100 Day, Thanksgiving Day and Christmas Day, provided

the employees work the day before and the day after the holiday. In the event the employee works on any of the aforesaid holidays, he shall be entitled to double time.

Section 5. The Union hereby agrees that its members shall obey any authorized representative of the Employer in performing the work required, and conduct themselves in respectful manner, and work in every way to the best interest of their Employer.

Section 6. The duties of the Apprentice and Operating Engineers shall be confined to the operation and care of all boilers, pumps, ventilating fans, and all refrigeration, and all other machinery properly belonging to the Engineers Jurisdiction of the Operating Engineers. The Operating Engineers shall make the necessary repairs in maintaining their equipment that can properly be expected of the Engineers.

Section 7. The Union hereby agrees to furnish qualified Apprentice and Operating Engineers to perform the work required by the Employer, and the Employer has the right to make such rules and regulations as may be necessary to perform the work required of the Apprentice and Operating Engineers, providing that they do not conflict with the terms of this agreement or with the jurisdictional limitations of the Union.

Section 8. The Employer hereby agrees to employ one Operating Engineer and one Apprentice Engineer at the Gary store and also at the Hammond store. During the hours that the services of an Operating Engineer or Apprentice shall be required by the Employer, the Employer agrees to employ either an Operating Engineer or an Apprentice, provided, however, that the Operating Engi-
101 neer shall have priority to work overtime hours if any such work is required by the Employer.

Section 9. The Employer shall have the right to discharge an employee for just cause. Just cause shall consist of dishonesty, drunkenness, absenteeism, insubordination, theft and inefficiency. The Employer hereby agrees that when desiring to dispose of the services of any employee not satisfactory to the Employer, to give two weeks' notice in writing, or to pay two weeks' salary in lieu thereof. No notice shall be required to be served upon employees for dishonesty or drunkenness.

Section 10. It is hereby agreed that there shall be no strikes, lockouts, stoppages or the use of any economic coercion during the term of this agreement. It is hereby agreed that any dispute, controversy or question arising under this agreement which cannot be settled by discussion and negotiation between the parties shall be submitted to arbitration and each party hereto shall select one arbitrator and the two shall select a third. In the event the arbitrators designated by the parties cannot agree upon the third arbitrator, then the Department of Conciliation of the United States Department of Labor is hereby authorized to appoint the third arbitrator. The arbitrators thus appointed shall meet within six (6) days and the decision of the majority of the arbitrators shall be conclusive upon both parties hereto.

Section 11. This contract shall be in force and binding upon both parties hereto from the 20th day of January, 1949, to and including the 20th day of July, 1949, and 102 from year to year thereafter, unless either party shall notify the other in writing within sixty (60) days prior to July 20, 1949, or at least within sixty (60) days prior to July 20th in any subsequent year, of the termination thereof.

In Witness Whereof, the pa es hereto have hereunto set their hands and seals the day and year first above written.

Goldblatt Bros., Inc.,
By Bernard Brown, (Seal)
Vice President,

The International Union of Operating Engineers Local No. 846-A,
By Arthur L. Brookman, (Seal)
Pres.
Harold Kading, (Seal)
Recording Corresponding Sec.

Notice—Conditional Approval.

This contract is approved by the Office of the General President as to form only as provided in the Constitution. All financial liability for claimed violations of this contract is limited solely to the responsibility of the Local Union involved and not assumed by any other subdivision or General Officer of the International Union. This conditional approval forms part of this Contract.

Wm. E. Maloney,
General President, I.U.O.E.

103 PLAINTIFF'S EXHIBIT NO. 4.

This Agreement made and entered into by and between Goldblatt Bros., Inc., Party of the First Part, and Local Unions 846 and 846-A of the International Union of Operating Engineers of Hammond, Indiana and Vicinity, Party of the Second Part;

Witnesseth:

In consideration of the following agreement by the Party of the First Part, the Party of the Second Part hereby agrees for its members:

Article I.

That they shall keep the machinery under their charge in good running order and do all temporary repairs.

Article II.

That they shall obey all orders of those in authority and conduct themselves in a respectful and gentlemanly manner, and work in every way to the best interest of their Employer.

Article III.

The Party of the First Part hereby agrees and does hereby recognize Local Unions 846 and 846-A, Party of the Second Part, as the collective bargaining agency for all employees of the company engaged in operating or assisting in operating all boilers, engines, turbines, motors, internal combustion engines, pumps, air compressors, generators, ice and refrigerating machines, air-conditioning units and plants, fans, siphons, also automatic and power-oiling pumps and any and all automatic and power-

driven machines and engines (including all appurtenances), and any and all operating repairs necessary for proper and continuous operation of all plants, machinery and engines.

Article IV.

The rate of wages for Apprentice Engineers shall be not less than $1.75 per hour.

The rate of wages for Operating Engineers shall be not less than $2.10 per hour.

104 Eight consecutive hours per day or night shall be considered a day's or night's work. All work over eight hours shall be considered overtime and shall be paid for at the rate of time and one-half at the above rate of wages. Five days in periods of eight hours each shall constitute a week's work. All work in excess of forty hours shall be paid for at the rate of time and one-half at the above rate of wages. Any time that an Engineer is required to work seven consecutive days, he shall be entitled to be paid at the rate of double time for each seventh day.

Double time will be paid for the following holidays if worked: New Year's Day, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day. All Engineers who are not required to work upon any of such holidays will receive their regular straight time rate. Eight hours of such holiday pay shall be credited as hours worked.

Vacation to be in accordance with Company's policy.

Article V.

Any Engineer now in the employ of the Party of the First Part who is now receiving a higher rate of wages than is specified in this Agreement shall suffer no reduction in his wages during the life of this Agreement.

Article VI.

No watch shall begin or end between the hours of twelve o'clock midnight and seven o'clock A.M.

Article VII.

In case of a prolonged illness of an Engineer, he shall for a period of four months from date of the beginning of his illness, be entitled on recovery to his former position.

105 Article VIII.

During the term of this agreement there shall be no strikes, lockouts, stoppages or the use of any form of economic coercion by either of the parties hereto.

Article IX.

It is further mutually agreed by and between said parties:

1. That during the life of this agreement there shall be no further demands made upon either party.

2. That any dispute, controversy or question arising under this agreement which cannot be settled by discussion and negotiation between the parties shall be submitted to arbitration. Each party hereto shall select one arbitrator and the two shall select a third. In the event the arbitrators designated by the parties cannot agree upon the third arbitrator, then the Department of Conciliation of the United States Department of Labor is hereby authorized to appoint the third arbitrator. The arbitrators thus appointed shall meet within six days and the decision of the majority of the arbitrators shall be conclusive upon both parties hereto.

3. No change shall be permitted in this agreement by any member, Local or Representative, without the written approval of Local No. 846 and Local No. 846-A of the Inter-

national Union of Operating Engineers of Hammond, Indiana and vicinity.

This agreement is in force from July 20, 1949 to July 20, 1950.

Goldblatt Bros., Inc.,
By Bernard Brown, *Vice Pres.*,

Local Union No. 846 of the International Union of Operating Engineers of Hammond, Indiana and Vicinity,
By Arthur L. Brookman, *Pres.*,
By Harold Kading,

Local Union No. 846-A of the International Union of Operating Engineers of Hammond, Indiana and Vicinity,
By Arthur L. Brookman, *Pres.*,
By Harold Kading.

Approved:
International Union of
Operating Engineers,
Operating Engineers,
By Victor J. Musenbrick,
Vice-President.

106 PLAINTIFF'S EXHIBIT NO. 5.

This Agreement made and entered into by and between Goldblatt Bros., Inc., Party of the First Part, and Local Union 846 of the International Union of Operating Engineers of Hammond, Indiana and Vicinity, Party of the Second Part:

Witnesseth:

In consideration of the following agreement by the Party of the First Part, the Party of the Second Part hereby agrees for its members:

Article I.

That they shall keep the machinery under their charge in good running order and do all temporary repairs.

Article II.

That they shall obey all orders of those in authority and conduct themselves in a respectful and gentlemanly manner, and work in every way to the best interest of their Employer.

Article III.

The Party of the First Part hereby agrees and does hereby recognize Local Union 846, Party of the Second Part, as the collective bargaining agency for all employees of the company engaged in operating or assisting in operating all boilers, engines, turbines, motors, internal combustion engines, pumps, air compressors, generators, ice and refrigerating machines, air-conditioning units and plants, fans, siphons, also automatic and power-oiling pumps and any and all automatic and power-driven machines and engines

(including all appurtenances), and any and all operating repairs necessary for proper and continuous operation of all plants, machinery and engines.

Article IV.

The rate of wages for Apprentice Engineers shall be not less than $1.82½ per hour.

The rate of wages for Operating Engineers shall be not less than $2.17½ per hour.

107 Eight consecutive hours per day or night shall be considered a day's or night's work. All work over eight hours shall be considered overtime and shall be paid for at the rate of time and one-half at the above rate of wages. Five days in periods of eight hours each, shall constitute a week's work. All work in excess of forty hours shall be paid for at the rate of time and one-half at the above rate of wages. Any time that an Engineer is required to work seven consecutive days, he shall be entitled to be paid at the rate of double time for such seventh day.

Double time will be paid for the following holidays if worked: New Year's Day, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day. All Engineers who are not required to work upon any of such holidays will receive their regular straight time rate. Eight hours of such holiday pay shall be credited as hours worked.

Vacation to be in accordance with the Company's policy.

Article V.

Any Engineer now in the employ of the Party of the First Part who is now receiving a higher rate of wages than is specified in this Agreement shall suffer no reduction in his wages during the life of this Agreement.

Article VI.

No watch shall begin or end between the hours of twelve o'clock midnight and seven o'clock A.M.

Article VII.

In case of a prolonged illness of an Engineer, he shall for a period of four months from date of the beginning of his illness, be entitled on recovery to his former position.

108

Article VIII.

During the term of this agreement there shall be no strikes, lockouts, stoppages or the use of any form of economic coercion by either of the parties hereto.

Article IX.

It is further mutually agreed by and between said parties:

1. That during the life of this agreement there shall be no further demands made upon either party.

2. That any dispute, controversy or question arising under this agreement which cannot be settled by discussion and negotiation between the parties shall be submitted to arbitration. Each party hereto shall select one arbitrator and the two shall select a third. In the event the arbitraters designated by the parties cannot agree upon the third arbitrator, then the Department of Conciliation of the United States Department of Labor is hereby authorized to appoint the third arbitrator. The arbitrators thus appointed shall meet within six days and the decision of the majority of the arbitrators shall be conclusive upon both parties hereto.

3. No change shall be permitted in this agreement by any member, Local or Representative, without the written

approval of Local No. 846, of the International Union of Operating Engineers of Hammond, Indiana and Vicinity.

This agreement is in force from July 20, 1950 to July 20, 1951.

Goldblatt Bros., Inc.,
By Bernard Brown, *Vice Pres.*,

Local Union No. 846 of the International Union of Operating Engineers of Hammond Indiana and Vicinity,
By Arthur L. Brookman, *Pres.*,
By Harold Kading.

Approved:

International Union of
Operating Engineers.
By Wm. E. Maloney,
General President.

Dated Oct. 10, 1950.

169 PLAINTIFF'S EXHIBIT NO. 6.

This Agreement made and entered into by and between Goldblatt Bros., Inc., Party of the First Part, and Local Union 846 of the International Union of Operating Engineers of Hammond, Indiana and vicinity, Party of the Second Part:

Witnesseth:

In consideration of the following agreement by the Party of the First Part, the Party of the Second Part hereby agrees for its members:

Article I.

That they shall keep the machinery under their charge in good running order and do all temporary repairs.

Article II.

That they shall obey all orders of those in authority and conduct themselves in a respectful and gentlemanly manner, and work in every way to the best interest of their Employer.

Article III.

The Party of the First Part hereby agrees and does hereby recognize Local Union 846, Party of the Second Part, as the collective bargaining agency for all employees of the company engaged in operating or assisting in operating all boilers, engines, turbines, motors, internal combustion engines, pumps, air compressors, generators, ice and refrigerating machines, air-conditioning units and plants, fans, siphons, also automatic and power-oiling pumps and any and all automatic and power-driven machines and engines (including all appurtenances), and any and all operating

repairs necessary for proper and continuous operation of all plants, machinery and engines.

Article IV.

The rate of wages for Apprentice Engineers shall not be less than $1.93 per hour.

The rate of wages for Operating Engineers shall be not less than $2.31 per hour.

110 Eight consecutive hours per day or night shall be considered a day's or night's work. All work over eight hours shall be considered overtime and shall be paid for at the rate of time and one-half at the above rate of wages. Five days in periods of eight hours each shall constitute a week's work. All work in excess of forty hours shall be paid for at the rate of time and one-half at the above rate of wages. Any time that an Engineer is required to work seven consecutive days he shall be entitled to be paid at the rate of double time for such seventh day.

Double time will be paid for the following holidays if worked; New Year's Day, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day. All Engineers who are not required to work upon any of such holidays will receive their regular straight time rate. Eight hours of such holiday pay shall be credited as hours worked.

Vacation to be in accordance with Company's policy.

Article V.

Any Engineer now in the employ of the Party of the First Part who is now receiving a higher rate of wages than is specified in this Agreement shall suffer no reduction in his wages during the life of this Agreement.

Article VI.

No watch shall begin or end between the hours of twelve o'clock midnight and seven o'clock A.M.

Article VII.

In case of a proionged illness of an Engineer, he shall for a period of four months from date of the beginning of his illness, be entitled on recovery to his former position.

111

Article VIII.

During the term of this agreement there shall be no strikes, lockouts, stoppages or the use of any form of economic coercion by either of the parties hereto.

Article IX.

It is further mutually agreed by and between said parties:

1. That during the life of this agreement there shall be no further demands made upon either party.

2. That any dispute, controversy or question arising under this agreement which cannot be settled by discussion and negotiation between the parties shall be submitted to arbitration. Each party hereto shall select one arbitrator and the two shall select a third. In the event the arbitrators designed by the parties cannot agree upon the third arbitrator, then the Department of Conciliation of the United States Department of Labor is hereby authorized to appoint the third arbitrator. The arbitrators thus appointed shall meet within six days and the decision of the majority of the arbitrators shall be conclusive upon both parties hereto.

3. No change shall be permitted in this agreement by any member, Local or Representative, without the written approval of Local No. 846 of the International Union of Operating Engineers of Hammond, Indiana and Vicinity.

This agreement in force from July 20, 1951 to July 20, 1952.

Goldblatt Bros., Inc.
By Herman G. Buckley,

Local Union No. 846 of the International Union of Operating Engineers of Hammond, Indiana and Vicinity,
By Arthur L. Brookman,
Stephen C. Stevens.

Notice—Conditional Approval.

This contract is approved by the Office of the General President as to form only as provided in the Constitution. All financial liability for claimed violations of this contract is limited solely to the responsibility of the Local Union involved and not assumed by any other subdivision or General Officer of the International Union. This conditional approval forms part of this Contract.

Wm. E. Maloney,
General President, I.U.O.E.

Dated Jan. 2, 1952.

112 PLAINTIFF'S EXHIBIT NO. 7.

This agreement made and entered into by and between Goldblatt Bros., Inc., Party of the First Part, and Local Union 846 of the International Union of Operating Enginners of Hammond, Indiana and Vicinity, Party of the Second Part:

Witnesseth:

In consideration of the following agreement by the Party of the First Part, the Party of the Second Part hereby agrees for its members:

Article I.

That they shall keep the machinery under their charge in good running order and do all temporary repairs.

Article II.

That they shall obey all orders of those in authority and conduct themselves in a respectful and gentlemanly manner, and work in every way to the best interest of their Employer.

Article III.

The Party of the First Part hereby agrees and does hereby recognize Local Union 846, Party of the Second Part, as the collective bargaining agency for all employees of the company engaged in operating or assisting in operating all boilers, engines, turbines, motors, internal combustion engines, pumps, air compressors, generators, ice and refrigerating machines, air-conditioning units and plants, fans, siphons, also automatic and power-oiling pumps and any and all automatic and power-driven ma-

chines and engines (including all appurtenances), and any and all operating repairs necessary for proper and continuous operation of all plants, machinery and engines.

Article IV.

The rate of wages for Operating Engineers shall be not less than $2.40 per hour.

The rate of wages for Apprentice Engineers shall be not less than $2.02 per hour.

113 Eight consecutive hours per day or night shall be considered a day's or night's work. All work over eight hours shall be considered overtime and shall be paid for at the rate of time and one-half at the above rate of wages. Five days in periods of eight hours each shall constitute a week's work. All work in excess of forty hours shall be paid for at the rate of time and one-half at the above rate of wages. Any time that an Engineer is required to work seven consecutive days, he shall be entitled to be paid at the rate of double time for such seventh day.

Double time will be paid for the following holidays if worked: New Year's Day, Decoration Day, Fourth of July Labor Day, Thanksgiving Day and Christmas Day. All Engineers who are not required to work upon any of such holidays will receive their regular straight time rate. Eight hours of such holiday pay shall be credited as hours worked.

Vacation to be in accordance with Company's policy.

Article V.

Any Engineer now in the employ of the Party of the First Part who is now receiving a higher rate of wages than is specified in this Agreement shall suffer no reduction in his wages during the life of this Agreement.

Article VI.

No watch shall begin or end between the hours of twelve o'clock midnight and seven o'clock A.M.

Article VII.

In case of a prolonged illness of an Engineer, he shall for a period of four months from date of the beginning of his illness, be entitled on recovery to his former position.

Article VIII.

During the term of this Agreement there shall be no strikes, lockouts, stoppages or the use of any form of economic coercion by either of the Parties hereto.

114

Article IX.

It is further mutually agreed by and between said parties:

1. That during the life of this agreement there shall be no further demands made upon either party.

2. That any dispute, controversy or question arising under this Agreement which cannot be settled by discussion and negotiation between the Parties shall be submitted to arbitration. Each Party hereto shall select one arbitrator and the two shall select a third. In the event the arbitrators designated by the Parties cannot agree upon the third arbitrator, then the Department of Conciliation of the United States Department of Labor is hereby authorized to appoint the third arbitrator. The arbitrators thus appointed shall meet within six days and the decision of the majority of the arbitrators shall be conclusive upon both Parties hereto.

3. No change shall be permitted in this Agreement by any member, Local or Representative, without the written approval of Local No. 846 of The International Union of Operating Engineers of Hammond, Indiana and Vicinity.

This Agreement in force from July 20, 1952 to July 20, 1953.

Goldblatt Bros., Inc.
By Herman G. Buckley,

Local Union No. 846 of the International Union of Operating Engineers of Hammond, Indiana and Vicinity,
By /s/ Arthur L. Brookman,
President.
By Joseph O'Sullivan,
Recording Corresponding Secretary.

Notice—Conditional Approval.

This contract is approved by the Office of the General President as to form only as provided in the Constitution. All financial liability for claimed violations of this contract is limited solely to the responsibility of the Local Union involved and not assumed by any other subdivision or General Officer of the International Union. This conditional approval forms part of this Contract.

Wm. E. Maloney,
General President, I.U.O.E.

Nov. 4, 1952.

115 PLAINTIFF'S EXHIBIT NO. 8.

This Agreement, made and entered into by and between Goldblatt Bros., Inc., Party of the First Part, and Local Union 846 of the International Union of Operating Engineers of Hammond, Indiana and Vicinity, Party of the Second Part:

Witnesseth:

In consideration of the following agreement by the Party of the First Part, the Party of the Second Part hereby agrees for its members:

Article I.

That they shall keep the machinery under their charge in good running order and do all temporary repairs.

Article II.

That they shall obey all orders of those in authority and conduct themselves in a respectful and gentlemanly manner, and work in every way to the best interest of their employer.

Article III.

The Party of the First Part hereby agrees and does hereby recognize Local Union 846, Party of the Second Part, as the collective bargaining agency for all employees of the Company engaged in operating or assisting in operating all boilers, engines, turbines, motors, internal combustion engines, pumps, air compressors, generators, ice and refrigerating machines, air-conditioning units and plants, fans, siphons, also automatic and power-oiling pumps, and any and all automatic and power-driven ma-

chines and engines (including all appurtenances), and any and all operating repairs necessary for proper and continuous operation of all plants, machinery and engines.

Article IV.

The rate of wages for Operating Engineers shall be not less than $2.55 per hour.

The rate of wages for Apprentice Engineers shall be not less than $2.17 per hour.

116 Eight consecutive hours per day or night shall be considered a day's or night's work. All work over eight hours shall be considered overtime and shall be paid for at the rate of time and one-half at the above rate of wages. Five days in periods of eight hours each shall constitute a week's work. All work in excess of forty hours shall be paid for at the rate of time and one-half at the above rate of wages. Any time that an Engineer is required to work seven consecutive days, he shall be entitled to be paid at the rate of double time for such seventh day.

Double time will be paid for the following holidays if worked: New Year's Day, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day. All Engineers who are not required to work upon any of such holidays will receive their regular straight time rate. Eight hours of such holiday pay shall be credited as hours worked.

Vacation to be in accordance with the Company's policy.

Article V.

Any Engineer now in the employ of the Party of the First Part who is now receiving a higher rate of wages than is specified in this Agreement shall suffer no reduction in his wages during the life of this Agreement.

Article VI.

No watch shall begin or end between the hours of twelv o'clock midnight and seven o'clock A.M.

Article VII.

In case of a prolonged illness of an Engineer, he shall for a period of four months from date of the beginning of his illness, be entitled, upon recovery, to his former position.

Article VIII.

During the term of this Agreement there shall be no strikes, lockouts, stoppages or the use of any form o economic coercion by either of the parties hereto.

117

Article IX.

It is further mutually agreed by and between said parties:

1. That during the life of this Agreement there shall be no further demands made upon either party.

2. That any dispute, controversy or question arising under this Agreement which cannot be settled by discussion and negotiation between the parties shall be submitted to arbitration. Each party hereto shall select one arbitrator and the two shall select a third. In the event the arbitrators designated by the parties cannot agree upon the third arbitrator, then the Department of Conciliation of the United States Department of Labor is hereby authorized to appoint the third arbitrator. The arbitrators thus appointed shall meet within six days and the decision of the majority of the arbitrators shall be conclusive upon both parties hereto.

3. No change shall be permitted in this Agreement by

any member, local or representative, without the written approval of Local No. 846 of the International Union of Operating Engineers of Hammond, Indiana and vicinity.

4. This Agreement shall be in force from July 20, 1953 to July 20, 1954, provided, however, that it is agreed that subsequent to January 15, 1954 the Union shall have the right to negotiate for a further increase in wage rates, but as to no other term, condition or provision of said Agreement.

Goldblatt Bros., Inc.,
By Herman G. Buckley,

Local Union No. 846 of the International Union of Operating Engineers of Hammond, Indiana and Vicinity,
By Arthur L. Brookman,
By V. J. Musenbrick,
Rec. Sec.

118 PLAINTIFF'S EXHIBIT NO. 9.

This Agreement, made and entered into by and between Goldblatt Bros., Inc., Party of the First Part, and Local Union 846 of the International Union of Operating Engineers of Hammond, Indiana and Vicinity, Party of the Second Part:

Witnesseth:

In consideration of the following agreement by the Party of the First Part, the Party of the Second Part hereby agrees for its members:

Article I.

That they shall keep the machinery under their charge in good running order and do all temporary repairs.

Article II.

That they shall obey all orders of those in authority and conduct themselves in a respectful and gentlemanly manner, and work in every way to the best interest of their employer.

Article III.

The Party of the First Part hereby agrees and does hereby recognize Local Union 846, Party of the Second Part, as the collective bargaining agency for all employees of the Company engaged in operating or assisting in operating all boilers, engines, turbines, motors, internal combustion engines, pumps, air compressors, generators, ice and refrigerating machines, air-conditioning units and plants, fans, siphons, also automatic and power-oiling pumps and any and all automatic and power-driven machines and engines (including all appurtenances), and any

and all operating repairs necessary for proper and continuous operation of all plants, machinery and engines.

Article IV.

The rate of wages for Operating Engineers shall be not less than $2.60 per hour.

The rate of wages for Apprentice Engineers shall be not less than $2.22 per hour.

119 Eight consecutive hours per day or night shall be considered a day's or night's work. All work over eight hours shall be considered overtime and shall be paid for at the rate of time and one-half at the above rate of wages. Five days in periods of eight hours each shall constitute a week's work. All work in excess of forty hours shall be paid for at the rate of time and one-half at the above rate of wages. Any time that an Engineer is required to work seven consecutive days, he shall be entitled to be paid at the rate of double time for such seventh day.

Double time will be paid for the following holidays if worked: New Year's Day, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day. All Engineers who are not required to work upon any of such holidays will receive their regular straight time rate. Eight hours of such holiday pay shall be credited as hours worked.

Vacation to be in accordance with the Company's policy.

Article V.

Any Engineer now in the employ of the Party of the First Part who is now receiving a higher rate of wages than is specified in this agreement shall suffer no reduction in his wages during the life of this agreement.

Article VI.

No watch shall begin or end between the hours of twelve o'clock Midnight and seven o'clock A. M.

Article VII.

In case of a prolonged illness of an Engineer, he shall for a period of four months from date of the beginning of his illness, be entitled, upon recovery, to his former position.

Article VIII.

During the term of this agreement there shall be no strikes, lockouts, stoppages or the use of any form of economic coercion by either of the parties hereto.

120 It is further mutually agreed by and between said parties:

1. That during the life of this Agreement there shall be no further demands made upon either party.

2. That any dispute, controversy or question arising under this Agreement which cannot be settled by discussion and negotiation between the parties shall be submitted to arbitration. Each party hereto shall select one arbitrator and the two shall select a third. In the event the arbitrators designated by the parties cannot agree upon the third arbitrator, then the Department of Conciliation of the United States Department of Labor is hereby authorized to appoint the third arbitrator. The arbitrators thus appointed shall meet within six days and the decision of the majority of the arbitrators shall be conclusive upon both parties hereto.

3. No change shall be permitted in this Agreement by any member, local or representative, without the written

approval of Local No. 846 of the International Union of Operating Engineers of Hammond, Indiana and Vicinity.

4. This agreement shall be in full force and effect from July 19, 1954, to and including July 24, 1955, and shall be automatically renewed on a year to year basis thereafter, unless either of the parties hereto shall, at least sixty (60) days prior to July 24, 1955, or at least sixty (60) days prior to any annual expiration date thereafter, serve notice in writing to the other party hereto to re-open this Agreement in whole or in part for modification or amendment.

In Witness Whereof, the parties have hereunto set their hands and seals this 19th day of August, 1954, as of the 19th day of July, 1954.

Goldblatt Bros., Inc.,
By Herman S. Buckley,

Local Union No. 846 of the International Union of Operating Engineers of Hammond, Indiana and Vicinity,
By Arthur L. Brookman,
Pres.

By Victor J. Musenbrock,
Rec. Sec.

121 PLAINTIFF'S EXHIBIT NO. 10.

This Agreement, made and entered into by and between Goldblatt Bros., Inc., Party of the First Part, and Local Union 846 of the International Union of Operating Engineers of Hammond, Indiana and Vicinity, Party of the Second Part:

Witnesseth:

In consideration of the following agreement by the Party of the First Part, the Party of the Second Part hereby agrees for its members:

Article I.

That they shall keep the machinery under their charge in good running order and do all temporary repairs.

Article II.

That they shall obey all orders of those in authority and conduct themselves in a respectful and gentlemanly manner, and work in every way to the best interest of their employer.

Article III.

The Party of the First Part hereby agrees and does hereby recognize Local Union 846, Party of the Second Part, as the collective bargaining agency for all employees of the Compa.., engaged in operating or assisting in operating all boilers, engines, turbines, motors, internal combustion engines, pumps, air compressors, generators, ice and refrigerating machines, air-conditioning units and plants, fans, siphons; also automatic and power-oiling pumps and any and all automatic and power-driven ma-

chines and engines (including all appurtenances), and any and all operating repairs necessary for proper and continuous operation of all plants, machinery and engines.

Article IV.

The wage rates for Operating Engineers shall be as follows:

From July 25, 1955, to and including July 24, 1956—$2.69 per hour.

From July 25, 1956, to and including July 24, 1958—$2.78 per hour.

122 The wage rates for Apprentice Engineers shall be as follows:

From July 25, 1955, to and including July 24, 1956 — $2.31 per hour.

From July 25, 1956, to and including July 24, 1958 — $2.40 per hour.

Eight consecutive hours per day or night shall be considered a day's or night's work. All work over eight hours shall be considered overtime and shall be paid for at the rate of time and one-half at the above rate of wages. Five days in periods of eight hours each shall constitute a week's work. All work in excess of forty hours shall be paid for at the rate of time and one-half at the above rate of wages. Any time that an Engineer is required to work seven consecutive days, he shall be entitled to be paid at the rate of double time for such seventh day.

Double time will be paid for the following holidays if worked: New Year's Day, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day. All Engineers who are not required to work upon any of such holidays will receive their regular straight time rate. Eight hours of such holiday pay shall be credited as hours worked.

Vacation to be in accordance with the Company's policy.

Article V.

Any Engineer now in the employ of the Party of the First Part who is now receiving a higher rate of wages than is specified in this agreement shall suffer no reduction in his wages during the life of this agreement.

Article VI.

No watch shall begin or end between the hours of twelve o'clock Midnight and seven o'clock A. M.

Article VII.

In case of a prolonged illness of an Engineer, he shall for a period of four months from date of the beginning of his illness, be entitled, upon recovery, to his former position.

123 Article VIII.

During the term of this agreement there shall be no strikes, lockouts, stoppages or the use of any form of economic coercion by either of the parties hereto.

Article IX.

It is further mutually agreed by and between said parties:

1. That during the life of this agreement there shall be no further demands made upon either party.

2. That any dispute, controversy or question arising under this agreement which cannot be settled by discussion and negotiation between the parties shall be submitted to arbitration. Each party hereto shall select one arbitrator and the two shall select a third. In the event the arbitrators designated by the parties cannot agree upon the third arbitrator, then the Department of Conciliation of the United

States Department of Labor is hereby authorized to appoint the third arbitrator. The arbitrators thus appointed shall meet within six days and the decision of the majority of the arbitrators shall be conclusive upon both parties hereto.

3. No change shall be permitted in this agreement by any member, local or representative, without the written approval of Local No. 846 of the International Union of Operating Engineers of Hammond, Indiana and vicinity.

4. This agreement shall be in full force and effect from July 25, 1955, to and including July 24, 1958, and shall be automatically renewed on a year-to-year basis thereafter, unless either of the parties hereto shall, at least sixty (60) days prior to July 31, 1958, or at least sixty (60) days prior to any annual expiration date thereafter, serve notice in writing to the other party hereto to reopen this agreement, in whole or in part, for modification or amendment.

In Witness Whereof, the parties hereto have hereunto set their hands and seals this 3rd day of August, 1955, as of the 29th day of July, 1955.

Goldblatt Bros., Inc.

By _____

124 Local Union No. 846 of the International Union of Operating Engineers of Hammond, Indiana and vicinity,

By _____

By Victor J. Musenbrick.

125 DEFENDANT'S EXHIBIT NO. 1.

(Letterhead of Charles Levin, Attorney at Law, Hammond Indiana.)

May 1st, 1957

Arthur L. Brookman
c/o International Union of Operating Engineers
5847 Columbia Avenue
Hammond, Indiana

In re: Richard Kosley *vs.* Goldblatt Bros., Inc.

Dear Mr. Brookman:

Reference is made to a contract dated August 3rd, 1955, as of July 25th, 1955, and to contracts preceding, executed by Local Union 846 of the International Union of Operating Engineers of Hammond, Indiana and vicinity, as Party of the Second Part, and Goldblatt Bros., Inc., as Party of the First Part, whom I represent.

Be advised that the above captioned, Richard Kosley, formerly an employee of Goldblatt Bros., Inc. and who at the time of his employment with Goldblatt Bros., Inc. was a member of your Union, filed a claim against Goldblatt Bros., Inc. for monies he alleges to be due him under the terms of the above contracts. We have disputed his claim and we deny that any sum is due him.

Article IX of the agreement, among other things, provides as follows:

> "That any dispute, controversy or question arising under this agreement which can not be settled by discussion and negotiation between the parties shall be submitted to arbitration. Each party shall select one arbitrator, and the two shall select a third. In the event the arbitrators selected by the parties can not agree upon a third arbitrator, then the Department of

Conciliation of the United States Department of Labor is hereby authorized to appoint the third arbitrator. The arbitrators thus appointed shall meet within six days and the decision of the majority of the arbitrators shall be conclusive upon both parties hereto."

126 Accordingly, under the terms of the agreement, and inasmuch as Mr. Kosley and my clients are unable to settle their dispute by discussion and negotiation, we have decided to call for an arbitration. I am herewith enclosing an agreement for your signature and return. Please sign both copies.

We have selected as one of the arbitrators Mr. Stanford Clinton, 134 N. La Salle Street, Chicago, Illinois. If you will name an arbitrator in the agreement and provide me with his address I will arrange for Mr. Clinton to contact him and the two can proceed to select a third arbitrator. The dispute can then be submitted to the arbitrators for their decision and award.

Awaiting your reply, I am

Very truly yours,

Charles Levin,
Attorney at Law.

CL:JM
Enclosure

STANFORD CLINTON,
134 North La Salle Street,
Chicago, Illinois,

ROBERT A. SPRECHER,
100 West Monroe Street,
Chicago, Illinois,

CHARLES LEVIN,
5231 Hohman Avenue,
Hammond, Indiana,
Attorneys for Defendant-Appellant.

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SUPREME COURT, U. S.
FILED
APR 23 1958
FRY, Clerk

In the

United States Court of Appeals

For the Seventh Circuit

No. 12108

RICHARD KOSLEY,
Plaintiff-Appellee,

vs.

GOLDBLATT BROS., INC., a corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

Honorable Luther M. Swygert, Presiding Judge.

BRIEF AND APPENDIX FOR APPELLEE.

J. Walter Nowicki,
Edward J. Raskosky,
George Kohl,
5129 Hohman Avenue,
Hammond, Indiana,
Attorneys for Appellee.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone: Financial 6-2988

INDEX.

PAGE

Statement of Facts 1

Summary of Argument 4

The Contested Issues 5

Propositions of Law Relied Upon 6

Argument:

I. Section 301 of the Labor Management Relation Act of 1947 and Section 3 of the United States Arbitration Act have no application to the present case. 9

II. Principles of Contract Law as applied in the State of Indiana require an affirmance of the District Court's Decision. 11

Authorities Cited.

Cases

American Locomotive Company v. Chemical Research Corp. (CCA Mich.) 171 Fed. 2d 115, (1948) 14

Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437, (1955) 9, 11, 14

Bernhardt v. Polygraphic Company of America, Inc., 350 U. S. 198, (1956) 10, 13, 16

Forqueron v. Van Meter, 9 Ind. 270, (1857) 14

Grand Rapids and Indiana Railway Company v. Jaqua, 66 Ind. App. 113, 115 N.E. 73 (1917) 17

Heritage v. State, ex rel Crim Auditor et al., 43 Ind. App. 595, p. 600, 88 N.E. 114 (1909) 17

In re Feuer Transp. Inc., 295 N.Y. 87, 65 N.E. 2d 178, (1946) 13

Lake Michigan Water Company v. U. S. Fidelity Company, 70 Ind. App. 537, 123 N.E. 703 (1919) 12

La Nacional Platanera SCL v. North American Fruit and Steamship Corp., (CCA Ala.) 84 Fed. 2d 881, (1956) 14

Maitland v. Reed, 37 Ind. App. 469, 77 N.E. 290 (1905) 12

Radiator Specialty Co. v. Cannon Mills Inc., (CCA N.C.) 97 Fed. 2d 318, 319 (1938) 14

Textile Workers Union v. Lincoln Mills of Alabama, 77 S. Ct. 912, (1957) 10

United States v. Fred W. Voges, Voges Manufacturing Company, Inc. and Radar Holding Corporation et al, 124 F. Supp. 543 (1954) 15

STATUTES

Section 301, Labor Management Relation Act of 1947, 29 U.S.C. 185 ..... 9, 11

United States Arbitration Act, 9 U.S.C. Sec. 3 (Supp. Vol. 1952) 9, 10, 11

Burns Indiana Statutes Annotated (1952 Replacement Volume) Sec. 40-101 15

Burns Indiana Statutes Annotated (1952 Replacement Volume) Sec. 40-102 15

Burns Indiana Statutes Annotated (1946 Replacement Volume) Sec. 3-222 13

TEXTBOOKS

6 C.J.S. Arbitration and Award, Sec. 34 (e) p. 178 17

6 C.J.S. Arbitration and Award, Sec. 4, p. 155 13

In the

United States Court of Appeals

For the Seventh Circuit

No. 12108

RICHARD KOSLEY, Plaintiff-Appellee, vs. **GOLDBLATT BROS., INC., a corporation,** Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. Honorable Luther M. Swygert, Presiding Judge.

APPELLEE'S BRIEF.

STATEMENT OF FACTS.

The plaintiff's complaint against defendant is based upon diversity of citizenship and the required jurisdictional amount. (Appellee's Appendix p. 1a) The undisputed facts in the case at bar were that plaintiff's com-

plaint herein covered wages due him from defendant covering the period of July 1, 1947 to October 29, 1955. (Appendix 12) On October 9, 1956, defendant filed answer on the merits to plaintiff's complaint. (Appellee's Appendix p. 4a)

Plaintiff notified the business representative of the union, Mr. Stevens, in 1945, and on several occasions after that of his wage demand, and was told to just keep going until it was straightened out. (Appendix 13) Plaintiff notified Mr. Dall, the defendant's superintendent, in approximately 1949 or 1950, and no action was taken by Mr. Dall on his wage claim. (Appendix 14)

Without notice to the court or plaintiff, either by the defendant or the union, (Appendix 15) the defendant, on May 10, 1957, appointed Mr. Stanford Clinton, the defendant's attorney of record in this case, one of the arbitrators, and the union selected Frank Rebey. (Appendix 6, 7) Plaintiff was given no opportunity or consulted in the appointment of these arbitrators. (Appendix 14, 15) The plaintiff, through his attorney, first acquired notice that this matter was to be submitted to arbitration on approximately May 21, 1957, after the arbitrators and umpire had been selected, notifying plaintiff that on May 27, 1957, a hearing would be had before the arbitrators. (Appendix 5, 6)

The International Union of Operating Engineers Local 846 did not consult plaintiff, relative to the selection of the arbitrators. (Appendix 15) Mr. Brookman, the president and business manager of the local union, testified that he was not familiar with the dispute between plaintiff and defendant. (Appendix 19 and 20)

The union contract covers both the Hammond and Gary Stores, and covers four employees. (Appendix 24) Mr. Brookman did not notify Mr. Kosley when he learned of the proposed arbitration because Mr. Kosley is out of the union on a withdrawal card and the contract is between the union and Goldblatt, and he thinks that the union should protect itself. (Appendix 25) The union did not start the arbitration. (Appendix 28)

SUMMARY OF ARGUMENT.

I.

Section 301 of the Labor Management Relation Act of 1947, 29 U.S.C. Section 185, is not applicable to the case at bar due to the fact that plaintiff's suit is for unpaid wages and is based upon diversity of citizenship. There is nothing in the record to indicate that an "industry affecting commerce" is involved as required by said Section.

Section 3 of the United States Arbitration Act, 9 U.S.C. Section 3 (Supp. Vol. 1952) has no application to the present case due to the fact that Sections 1 and 2 of said Act specifically include only "maritime transactions" and contracts evidencing a transaction involving commerce, and specifically exclude contracts of employment.

II.

Defendant waived its right to arbitration by failing to take action on plaintiff's claim and filing answers on the merits of plaintiff's complaint. The arbitration clause in the present case did not contemplate the arbitration of a suit for unpaid wages and the Indiana Statutes have expressed a public policy that individual workmen have the right to sue for unpaid wages and damages in the courts and any contract to the contrary shall be void.

The federal courts in a diversity case must look to the state law to determine whether an arbitration provision would be enforceable and under Indiana law, common law arbitration agreements are revocable at any time before the award is made.

THE CONTESTED ISSUES.

I.

Does Section 301 of the Labor Management Relation Act of 1947, 29 U.S.C. Section 185, and Section 3 of the United States Arbitration Act, 9 U.S.C. Section 3 apply in a diversity suit between an employee and employer for unpaid wages where there is no evidence of an industry affecting commerce being involved?

II.

Did the Federal District Court in the instant case which was based upon diversity of citizenship, properly sit as another state court of the State of Indiana and properly apply the Indiana law which states that arbitration agreements are revocable?

PROPOSITIONS OF LAW RELIED UPON.

I.

Section 301 of the Labor Management Relation Act of 1947 and Section 1 of the United States Arbitration Act have no application to the present case.

A suit for unpaid wages by a union on behalf of certain employees is not the proper subject matter of a suit brought under Section 301 of the Labor Management Relation Act of 1947, 29 U.S.C. 185.

> *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, (1955).

The stay provision of Section 3 of the United States Arbitration Act, 9 U.S.C. Section 3 applies only to those contracts covered by Sections 1 and 2.

> *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U.S. 198, 201, 203, (1956).

II.

Principles of contract law as applied in the State of Indiana require the affirmance of the District Court's decision.

A reference to arbitration is not a condition precedent to an action at law.

> *Maitland* v. *Reed*, 37 Ind. App. 469, 470, 471, 77 N.E. 290 (1905).

The federal courts in a diversity case must look to the state law to determine whether an arbitration provision would be enforceable.

> *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U.S. 198, 201, 203, (1956).

Arbitrations are of two kinds, common law and statutory.

> 6 C.J.S., Arbitration and Award, Sect. 4, p. 155.

An arbitration which is not in accordance with the statute, is a common law arbitration.

> *Forqueron* v. *Van Meter*, 9 Ind. 270, 272 (1857).

A party may waive its right to enforce an arbitration clause through inaction and filing answers on the merits to a pending litigation.

> *La Nacional Platanera SCL* v. *North American Fruit and Steamship Corp.*, (CCA Ala.) 84 Fed. 2d 881, 883 (1936).
>
> *American Locomotive Company* v. *Chemical Research Corp.*, (CCA Mich.) 171 Fed. 2d 115, 121 (1948).
>
> *Radiator Specialty Co.* v. *Cannon Mills Inc.*, (CCA N.C.) 97 Fed. 2d 318, 319 (1938).

The employees have always been able to enforce their individual rights in the state courts.

Association of Westinghouse Salaried Employees v. *Westinghouse Electric Corp.*, 348 U.S. 437, 460 (1955).

Burns Indiana Statutes Annotated (1952 Replacement Volume), Sections 40-101 and 40-102.

A federal court enforcing a state created right in a diversity case is only another court of the State.

Bernhardt v. *Polygraphic Company of America, Inc.*, 350 U.S. 198, 203 (1956).

A common law submission may be revoked at any time before the award is made, even though the agreement provides that the submission cannot be revoked.

Heritage v. *State, ex rel Crim Auditor et al.*, 43 Ind. App. 595 p. 600, 88 N.E. 114 (1909).

Grand Rapids and Indiana Railway Company v. *Jaqua*, 66 Ind. App. 113, 115 N.E. 73 (1917).

ARGUMENT.

I.

Section 301 of the Labor Management Relation Act of 1947 and Section 3 of the United States Arbitration Act have no application to the present case.

Defendant's argument at page 8 of its brief asserting that Section 301 of the Labor Management Relation Act of 1947, 29 U.S.C. Section 185 is applicable, is based first of all on the false assumption that plaintiff had sued under Section 301. The complaint of plaintiff for unpaid wages in the present case was based upon the diversity of citizenship and the statutory amount of damages. (Appellee's Appendix p. 1a) There is nothing in the record to indicate that an "industry affecting commerce" is involved as required by Section 301. Also Section 301 applies only to suits "between an employer and a *labor organization.*"

This disposes of the plaintiff's argument as to Section 301, but it might be further pointed out that in the case of *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, (1955) that the Supreme Court held that a suit for unpaid wages by a union on behalf of certain employees was not a proper subject matter of a suit that could be brought under Section 301.

The defendant's contention at the bottom of page 9 and pages 10 and 11, (Appellee's Brief) that Section 3 of the United States Arbitration Act, 9 U.S.C. Section 3 (Supp. Vol. 1952) applies to the present case, even if it is based on the diversity of citizenship, is untenable.

The Supreme Court subsequently to the cases cited by defendant at pages 10 and 11 of its brief has spoken regarding the interpretation of Section 3 of the United States Arbitration Act, 9 U.S.C. Section 3.

"Since Section 3 is a part of the regulatory scheme, we can only assume that the "agreement in writing" for arbitration referred to in Section 3 is the kind of agreement which Sections 1 and 2 have brought under federal regulation. There is no intimation or suggestion in the Committee Reports that Sections 1 and 2 cover a narrower field than Section 3." • • • "We conclude that the stay provided in Section 3 reaches only those contracts covered by Sections 1 and 2." *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U.S. 198, 201, 202, (1956).

It is also to be noted that Section 3 of the United States Arbitration Act, 9 U.S.C. Section 3 (Supp. V. 1952) provides for a stay, "providing the applicant for the stay is not in default in proceeding with such arbitration." As pointed out in other sections of this brief herein, the defendant is in default in the proceeding for such arbitration by virtue of its filing answer on the merits of the case without raising any question of arbitration, and further by virtue of its inaction for a period of several years after notice of plaintiff's claim and for a period of several months after filing answer before a request was made for arbitration. The court is also directed to plaintiff's argument in Part II of the argument that the arbitration clause in the contract under discussion is inapplicable to a suit by an individual employee for past due wages and said arbitration agreement, even if applicable, was revoked by plaintiff.

As to other cases cited by defendant in Part I of its brief, plaintiff says that in the *Textile Workers Union* v. *Lincoln Mills of Alabama*, 77 S. Ct. 912, (1957) the court

merely held that it would grant specific performance of promises to arbitrate in a collective bargaining agreement when the action was brought under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C., Section 185.

Regarding Section 301 the Labor Management Relations Act the Supreme Court in the case of *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, (1955) at page 461 stated: "Nowhere in the legislative history did Congress discuss or show any recognition of the type of suit involved here, in which the union is suing on behalf of employees for accrued wages. Therefore, we conclude that Congress did not confer on the federal courts jurisdiction over a suit such as this one."

Therefore, since the present case was a suit for unpaid wages based upon diversity of citizenship, Section 301 of the Labor Management Relations Act of 1947 29 U.S.C. Section 185 and Section 3 of the United States Arbitration Act, 9 U.S.C. Section 3 (Supp. V. 1952) are not applicable to the case at bar.

II.

Principles of contract law as applied in the State of Indiana require an affirmance of the District Court's decision.

The defendant under part II of its brief asserts that the arbitration clause in the present case constituted a condition precedent prior to suit and in effect says that the arbitration clause is irrevocable, even though defendant admits the Indiana law to be that the common law arbitration may be revoked at any time prior to rendering of an award.

The cases of *Lake Michigan Water Company* v. *U. S. Fidelity Company* 70 Ind. App. 537, 542, 123 N.E. 703 (1919) and *Maitland* v. *Reed* 37 Ind. App. 469, 77 N.E. 290 (1905) cited by defendant at page 16 of its brief has no application in the present case, as they did not involve the revocation of an arbitration agreement.

In fact the case of *Maitland* v. *Reed* 37 Ind. App. 469, 470, 471, 77 N.E. 290 (1905) rejects the contention that in Indiana an arbitration agreement is a condition precedent to suit at law when the court stated at pages 470, 471:

> "Appellants filed a plea in abatement to Reed's cross-complaint, alleging the necessity, by the terms of the contract, of a reference to arbitration as a prerequisite to an action by Reed. The *demurrer to this answer was properly sustained.*" * * * "It is not competent for parties to a contract, in advance of any dispute, to oust the jurisdiction of the courts by providing that the decision of a party therein named upon a dispute which might thereafter arise shall be final and conclusive." (Our emphasis)

In the case of *Lake Michigan Water Company* v. *U. S. Fidelity Company* 70 Ind. App. 537, 123 N.E. 703 (1919) the court seems to say that an architect case is on a different basis than an ordinary arbitration agreement. However, in that case it is to be noted that payment had been made on the approval of the appellant's architect and suit filed some five years after the architect had approved the work and therefore the parties had in effect already submitted the matter to arbitration and payment had been made on the basis of the architect's "arbitration".

The New York cases cited by defendant has no application because the law of the State of New York differs from the law of the State of Indiana. In the case of *In re*

Feuer Transp. Inc. 295 N. Y. 87, 65 N.E. 2d 178, 180 (1946) the New York court stated:

> "Prior to this enactment, an arbitration agreement was easily violated. Before award, or in any event before final submission of a dispute under arbitration the agreement to arbitrate was revocable" • • • "Under the new statute arbitration became both orderly and enforceable and was made subject in effect to a decree for specific performance."

Therefore, the New York and other foreign decisions cited by the defendant would have no effect on the law of Indiana where the common law on arbitration agreements is still in force, i.e., Common law arbitration agreements are revocable.

The Federal District Court in the case at bar correctly enjoined defendant from proceeding with the proposed unlawful arbitration.

The federal courts in a diversity case must look to state law to determine whether an arbitration provision would be enforceable. *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U.S. 198, 205 (1956).

"Arbitrations are of two kinds, common law and statutory," 6 C.J.S. Arbitration and Award, Section 4, page 155. The arbitration clause in the present case was not a statutory arbitration by virtue of non-compliance with the Indiana Statute, Burns Indiana Statute Annotated (1946 Replacement Volume) Sec. 3-[illegible] which provides: "If the subject-matter of any suit pending in any court might originally have been submitted to arbitration, the parties to such suit, their agent or attorney-at-law, may consent, by rule of court, to refer the matter in controversy to certain persons mutually chosen by them in open court."

Since the arbitration was not in accordance with the Statute, the present case involved a common law arbitration. *Forqueron* v. *Van Meter* 9 Ind. 270, 272 (1857).

First of all, plaintiff asserts that the defendant waived its right to enforce the arbitration clause, when the defendant and the union stood by for over seven years after notice of plaintiff's claim; (Appendix 13, 14) and defendant filed answer to plaintiff's complaint and failed to take any action whatsoever on the arbitration until some seven months after answer was filed, arbitration was waived. *La Nacional Platanera SCL* v. *North American Fruit and Steamship Corp.* (CCA Ala.) 84 Fed. 2d 881, 883 (1936); *American Locomotive Company* v. *Chemical Research Corp.* CCA Mich. 171 Fed. 2d 115, 121 (1948); *Radiator Specialty Co.* v. *Cannon Mills Inc.*, (CCA N C.) 97 Fed. 2d 318, 319 (1938).

Secondly, the arbitration clause in the present case provided, "It is agreed that there shall be no strikes, lockouts, stoppages, or the use of any economic coercion during the term of this agreement." Certainly it is apparent that where the above phrase appears in the first sentence of the arbitration clause, that the matters contemplated by the party to be subject to arbitration are "union matters" involving strikes, lockouts, stoppages, or the use of economic coercion during the term of this agreement, or as characterized by the union president, it is the "no strike clause". (Appendix 21) and would not cover a claim by an individual employee for past due wages.

"The employees have always been able to enforce their individual rights in state courts." *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.* 348 U.S. 437, 460 (1955).

Therefore, a claim by an individual employee for back wages is an individual right which the employee has the right to sue in his own behalf in the state courts, or in the federal courts where there is the required amount and diversity of citizenship.

The collective bargaining agreement merely sets forth the general terms and conditions as to an employee's contract of hire, but where there is a breach in the terms and conditions which merely involve an individual right, such as the non-payment of wages, then the individual has the right to seek his remedies in the courts, such as was done in the case at bar.

Burns Indiana Statutes Annotated (1952 Replacement Volume) Sec. 40-101 provides "Every person, firm, corporation • • • doing business in this state shall pay each employee thereof at least twice each month, if requested, • • • the amount due such employee and such amount shall be payable in the lawful money of the United States • • • and *any contract to the contrary shall be void.*" (Our emphasis)

Burns Indiana Statutes Annotated (1952 Replacement Volume) Sec. 40-102 further provides for liquidated damages and attorney fees in the event that such payment is not made and states: "*and said damages may be recovered in any court* having jurisdiction of a suit to recover the amount due to such employee • • •" (Our emphasis)

In the case of *United States* v. *Fred W. Voges, Voges Manufacturing Company, Inc. and Radar Holding Corporation, et al*, 124 F. Supp. 543 (1954) it was held that in a suit between employee and employer's receiver, the em-

ployee has no right to compel arbitration under the collective bargaining agreement between the union and the employer.

Certainly the two cited statutes recognize the policy within the State of Indiana of giving to every employee a distinct right to collect his own wages in the courts, regardless what the collective bargaining agreement might provide.

Thirdly, the arbitration agreement was revocable under state law.

"* * * the federal court enforcing a state-created right in a diversity case is, * * * only another court of the State." *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U.S. 198, 203 (1956). The facts in that case were that it was a suit based upon diversity of citizenship for damages for the discharge of plaintiff under an employment contract. The contract contained a provision that in case of any dispute the parties would submit the matter to arbitration, whose determination shall be final and absolute. After the case had been removed to the district court, the defendant moved for a stay of proceeding so that the controversy could go to arbitration. The court held that the stay was properly denied. At page 203 the court stated: "If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference

in the ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by Ch. 1, Art. 12th, of the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial." The court further stated at page 204: "There would in our judgment be a resultant discrimination if the parties suing on a Vermont cause of action in the federal court were remitted to arbitration, while those suing in the Vermont court could not be."

"Generally the institution of a suit covering the same subject matter as that submitted to arbitration revokes the submission." 6 C.J.S. Arbitration and Award, Sec. 34 (e) p. 178 and cases cited therein.

"A common-law submission may be revoked at any time before the award is made, even though the agreement provides that the submission cannot be revoked." *Heritage* v. *State, ex rel Crim Auditor et al* 43 Ind. App. 595 P. 600, 88 N.E. 114 (1909), *Grand Rapids and Indiana Railway Company* v. *Jaqua*, 66 Ind. App. 113, 115 N.E. 73 (1917).

Therefore, in the case at bar immediately upon filing the plaintiff's complaint herein, the arbitration agreement, if we assume it covered the subject matter in dispute, was revoked by plaintiff. Further plaintiff expressly revoked any arbitration agreements at the hearing on his petition for restraining order. (Appendix 14)

Therefore the court below properly enjoined the defendant from proceeding with the arbitration proceedings under the court's ancillary jurisdiction.

Respectfully submitted,

J. WALTER NOWICKI,
EDWARD J. RASKOSKY,
GEORGE KOHL,
Attorneys for Appellant.

J. WALTER NOWICKI,
EDWARD J. RASKOSKY,
GEORGE KOHL,
5129 Hohman Avenue,
Hammond, Indiana.

INDEX TO APPENDIX.

	PAGE
Statement Pursuant to Rule 16(b)	1a
Complaint	1a
Answer	4a

APPELLEE'S APPENDIX.

UNITED STATES DISTRICT COURT,
Northern District of Indiana,
Hammond Division.

Richard Kosley

v.

Goldblatt Bros., Inc., a corporation
Hammond Civil 2075.

STATEMENT PURSUANT TO RULE 16 (b)

Complaint in the above case was filed September 15, 1956. Defendant filed answer on October 9, 1956.

Kenneth Lackey,
Clerk
By *Jean Erickson*,
Deputy.

IN THE UNITED STATES DISTRICT COURT
• • (Caption-2075) • •

COMPLAINT

The plaintiff, Richard Kosley, by his attorneys, Nowicki, Raskosky & Kohl, complains of the defendant, Goldblatt Bros., Inc., a corporation, and for cause of action alleges and says as follows:

1. That the plaintiff, Richard Kosley, is a citizen of the State of Indiana and resides in the City of Hammond, Indiana.

2. That the defendant, Goldblatt Bros., Inc., is a corporation incorporated under the laws of the State of Illinois and authorized to do business in the State of Indiana.

3. That the amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3000.00).

4. That the defendant, Goldblatt Bros., Inc., is and for many years prior hereto has been engaged in the retail department store business in the City of Hammond, Lake County, Indiana.

5. That for the period from July 1, 1947 to October 29, 1955, plaintiff was employed by the defendant as an operating engineer in defendant's Hammond, Indiana store.

6. That during said period of time, the defendant agreed to pay plaintiff the hourly rates for wages as shown by Exhibit "A" attached hereto and made a part of this complaint by reference, and further agreed to pay plaintiff at one and one-half times said rates for all hours worked in excess of forty hours per week, and that plaintiff worked fifty-six hours each week during said period.

7. During said period the defendant paid plaintiff for only forty-eight hours of work per week and thereby the defendant is indebted to plaintiff in the sum of Eleven Thousand Seven Hundred Seventy-one and 40/100 Dollars ($11,771.40) as shown by the attached Exhibit "A".

8. That on August 21, 1956, plaintiff demanded of defendant that it pay him said wages, but the defendant refused to do so and still refuses to pay him said wages, and the said wages are now due and wholly unpaid.

9. That by virtue of the Indiana Acts, 1933, Chapter 47, Section 2, page 371, Burns Indiana Statutes Annotated, 1952 Replacement Section 40-102 regulating the payment of wages, a penalty of Twenty-three Thousand Five Hundred Forty-two and 80/100 Dollars ($23,542.80) has accrued against the defendant.

10. That it has been necessary for the plaintiff to employ an attorney to collect said wages and a reasonable fee for said attorney is Five Hundred Dollars ($500.00).

Wherefore, plaintiff prays judgment for Thirty-five Thousand Three Hundred Fourteen and 20/100 Dollars ($35,314.20) plus Five Hundred Dollars ($500.00) attorney fees, and for all other proper relief in the premises.

• • • • •

EXHIBIT "A"

Period Worked	No. of Weeks	Regular Rate per	Hours worked and not paid for	Wages due at time and one-half
July 1, 1955 to Oct. 29, 1955	17	2.69	136	548.76
July 1, 1954 to July 1, 1955	52	2.60	416	1622.40
July 1, 1953 to July 1, 1954	52	2.55	416	1591.20
July 1, 1952 to July 1, 1953	52	2.40	416	1497.60
July 1, 1951 to July 1, 1952	52	2.31	416	1441.44
July 1, 1950 to July 1, 1951	52	2.17½	416	1357.20
July 1, 1949 to July 1, 1950	52	2.10	416	1310.40
July 1, 1948 to July 1, 1949	52	2.00	416	1248.00
July 1, 1947 to July 1, 1948	52	1.85	416	1154.40

IN THE UNITED STATES DISTRICT COURT

* * (Caption-2075) * *

ANSWER OF DEFENDANT

PARAGRAPH ONE

For answer to the complaint filed herein the defendant, Goldblatt Bros., Inc., says:

1) That it admits the allegations alleged in rhetorical paragraph 1 of said complaint.

2) That it admits the allegations alleged in rhetorical paragraph 2 of said complaint.

3) That it admits the allegations alleged in rhetorical paragraph 3 of said complaint.

4) That it admits the allegations alleged in rhetorical paragraph 4 of said complaint.

5) That it denies the allegations alleged in rhetorical paragraph 5 of said complaint.

6) That it denies the allegations alleged in rhetorical paragraph 6 of said complaint.

7) That it denies the allegations alleged in rhetorical paragraph 7 of said complaint.

8) That it denies the allegations alleged in rhetorical paragraph 8 of said complaint.

9) That it denies the allegations alleged in rhetorical paragraph 9 of said complaint.

10) That it denies the allegations alleged in rhetorical paragraph 10 of said complaint.

PARAGRAPH TWO

For further and second paragraph of answer to the complaint filed herein this defendant says:

1) That the complaint filed herein does not state a claim, nor does it state sufficient facts against this defendant upon which relief can be granted.

PARAGRAPH THREE

For further and third paragraph of answer to the complaint filed herein this defendant says:

1) That any and all claims or accounts due and owing from this defendant to plaintiff herein were fully paid long prior to the filing of this cause of action.

PARAGRAPH FOUR

For further and fourth paragraph of answer to the complaint filed herein this defendant says:

1) That if plaintiff herein did perform services for the defendant in excess of forty-eight hours per week, he did so without any request from this defendant and without being required to do so by this defendant and did so voluntarily and against the direction of the management of the store by which plaintiff was employed; that no employee of this defendant is required to work in excess of forty-eight hours per week without specific request.

PARAGRAPH FIVE

For further and fifth paragraph of answer to the complaint filed herein this defendant says:

1) That the cause of action sued upon herein has been and is barred by the statute of limitations.

Wherefore defendant prays judgment.

• • •

(Supplemental Transcript)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 950

GOLDBLATT BROS., INC.,
AN ILLINOIS CORPORATION,
Petitioner,

vs.

RICHARD KOSLEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STANFORD CLINTON,
134 North La Salle Street,
Chicago 2, Illinois,

ROBERT A. SPRECHER,
100 West Monroe Street,
Chicago 3, Illinois,

CHARLES LEVIN,
5231 Hohman Avenue,
Hammond, Indiana,
Counsel for Petitioner.

CITATIONS.

Cases.

Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U. S. 437, 75 S. Ct. 489 (1955) 6, 7

Bernhardt v. Polygraphic Company of America, 350 U. S. 198, 76 S. Ct. 273 (1956) 4, 5, 6

Donahue v. Susquehanna Collieries Company, 138 2d 3 (3d Cir., 1943) 5

Fargo v. Reighard, 13 Ind. App. 39, 39 N. E. 888 (1895) 7

Grand Rapids & I. R. Co. v. Jaqua, 66 Ind. App. 113, 115 N. E. 73 (1917) 8

Jones v. Mississippi Valley Barge Line Co., 98 F. Supp. 787 7

Kelley v. Adams, 120 Ind. 340, 342, 22 N. E. 317 (1889) 7

Lake Michigan Water Company v. U. S. Fidelity Co., 70 Ind. App. 537, 123 N. E. 703 (1919) 8

Local 205, etc. v. General Electric Company, 233 Fed. 2d 85, 97-100 (1st Cir., 1956) 5

Maitland v. Reed, 37 Ind. App. 469, 77 N. E. 290 (1905) 8

Memphis Trust Co. v. Brown-Ketchum Iron Works, 166 Fed. 398 (6th Cir., 1909) 8

Microflex Products Co., Inc. v. Rosenthal, 80 N. Y. S. 2nd 788 7

Miller v. Goodwine, 29 Ind. 46, 47 (1867) 7

Signal-Stat Corporation v. U. E. Workers of America, 235 F. 2d 298 (2d Cir., 1956) cert. den., 77 S. Ct. 1293 (1957) 4

Smith v. Steward, 5 Ind. 220 (1854) 7

Supreme Council of the Order of Chosen Friends v. Forsinger, 125 Ind. 52, 55, 25 N. E. 129 (1890) 8

Tenney Engineering, Inc. v. United Electrical Workers Local 437, 207 Fed. 2d 450 (3d Cir., 1953) 5

Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U. S. 448, 77 S. Ct. 912 (1957) 5

P. S. Thorsen & Co., Inc. v. Neves, 179 Misc. 11, 37 N. Y. S. 2nd 113 7

Transcontinental & Western Air, Inc. v. Koppal, 345 U. S. 653, 73 S. Ct. 906 (1953) 6, 8

Webb v. Zeller, 70 Ind. 408, 410 (1880) 7

Wilson & Company v. Fremont Cake & Meal Company, 77 F. Supp. 364 (Neb., 1948) 5

Statutes.

United States Arbitration Act, 9 U. S. C. §§ 1-3 ..... 2, 4

Section 301, Labor Management Relations Act, 29 U. S. C. § 185 ..... 2, 5

Burns, Indiana Statutes Annotated (1946 Replacement Volume) § 3-201 ..... 2, 7

Miscellaneous.

Burstein, "Enforcement of Collective Agreements by the Courts", 6 N. Y. U. Conf. on Labor 31 (1953) ... 6

Cox, "Grievance Arbitration in the Federal Courts", 67 Harv. L. Rev. 591, 599 (1954) 5

Cox, "Rights Under a Labor Agreement", 69 Harv. L. Rev. 601, 647-8 (1956) 6

Gregory, "The Collective Bargaining Agreement: Its Nature and Scope", 1949 Wash. U. L. Q. 3 6

Lenhoff, "The Present Status of Collective Contracts in the American Legal System", 39 Mich. L. Rev. 1109 (1941) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. .....

GOLDBLATT BROS., INC.,
AN ILLINOIS CORPORATION,
Petitioner,

vs.

RICHARD KOSLEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Goldblatt Bros., Inc., an Illinois corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above case on January 28, 1958, petition for rehearing denied on February 20, 1958.

OPINIONS BELOW.

The opinion of the District Court (App. R. 32-35) is unreported. The opinion of the Court of Appeals, printed in the Appendix herein, *infra*, p. 13, is reported at 251 F. 2d 558.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 28, 1958 (Appendix, *infra*, p. 19). Rehearing was denied on February 20, 1958 (Appendix, *infra*, p. 20). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Whether, in a diversity action brought by an employee against his employer who is engaged in commerce, for wages allegedly due him under a collective bargaining agreement, the employee may disregard arbitration provisions of such agreement and enjoin the employer from proceeding with arbitration?

STATUTES INVOLVED.

The statutory provisions involved are sections 1-3 of the United States Arbitration Act, 9 U. S. C. §§ 1-3, section 301 of the Labor Management Relations Act, 29 U. S. C. §185, and Burns Indiana Statutes Annotated (1946 Replacement Volume) §3-201. They are printed in the Appendix herein, *infra*, pp. 11-12.

STATEMENT.

The respondent, Richard Kosley, an Indiana resident, was employed by the petitioner, Goldblatt Bros., Inc., as an operating engineer from 1939 to November 1, 1955, on which date he was discharged (App. R. 15-6). On September 15, 1956, the respondent brought this action against the petitioner to recover wages claimed to be due during the period from July 1, 1947 to October 29, 1955 (App. 1, 2), on the ground that collective bargaining agreements between the petitioner and the union of which the respondent

was a member provided that all hours worked in excess of forty hours per week were to be paid at the hourly rate of time and one-half and that, during this period, the respondent was not so paid (App. R. 36, 39, 44, 48, 52, 56, 60, 64 and 68). Federal jurisdiction was based upon diversity of citizenship and the required jurisdictional amount (Supp. App. R. 1a).

Commencing July 20, 1947, and during each year thereafter, there was in force a collective bargaining contract between Local No. 846, International Union of Operating Engineers and the petitioner, Goldblatt Bros., Inc., covering the terms and conditions of employment of the members of that union as employees, and the petitioner as employer. The respondent was a member of the union (App. R. 18, 24-29). Each contract contained substantially the following provision (App. R. 28, 41, 45, 49, 53, 57, 61, 65 and 69):

> "It is hereby agreed that there shall be no strikes, lockouts, stoppages or the use of any economic coercion during the term of this agreement. *It is hereby agreed that any dispute, controversy or question arising under this agreement which can not be settled by discussion and negotiation between the parties shall be submitted to arbitration* and each party hereto shall select one arbitrator, and the two shall select a third. In the event the arbitrators designated by the parties can not agree upon the third arbitrator, then the Department of Conciliation of the United States Department of Labor is hereby authorized to appoint the third arbitrator. The arbitrators thus appointed shall meet within six days and the decision of the majority of the arbitrators shall be conclusive upon both parties hereto." (Emphasis added.)

In the first part of May, 1957, petitioner initiated arbitration proceedings and notified respondent's attorney. (Deft. Exs. 1, 2 and 3; App. R. 5-7, 71). Respondent then

filed a petition to restrain the petitioner, Goldblatt Bros., Inc., from further proceeding with the proposed arbitration. (App. R. 2-4). Following a hearing (App. R. 12-36), the District Court entered such a restraining order (App. R. 8-9). Upon the petitioner's appeal (App. R. 9), the Court of Appeals affirmed that order. (Appendix, *infra.*, p. 19.)

REASONS FOR GRANTING THE WRIT.

1. Neither of the courts below considered the applicability of the United States Arbitration Act to the present litigation. Section 3 of that Act (9 U. S. C. §3) gives the district court, in a diversity case, the power to stay the trial of an issue which was subject to arbitration under the agreement of the parties. Although this Court has held in *Bernhardt* v. *Polygraphic Company of America*, 350 U. S. 198, 76 S. Ct. 273 (1956) that section 3 requires, even in diversity cases, a "maritime transaction" or "a contract evidencing a transaction involving commerce," it appears that the collective bargaining agreement meets the latter test. Petitioner, an Illinois corporation, operates a retail department store at Hammond, Indiana; respondent was employed as an operating engineer at that store (Supp. App. R. 1a-2a). On July 11, 1957, the National Labor Relations Board held in Goldblatt Bros., Inc., Employer, and Retail Clerks Union Local 1460, Retail Clerks International Association, AFL-CIO, Petitioner, Case No. 13-RC-5286, 118 NLRB No. 74, that "The Employer is engaged in commerce within the meaning of the Act." Thus, as a matter of law, the collective bargaining agreement evidences a transaction involving commerce, and section 3 of the Act would require the district court to stay judicial proceedings in favor of arbitration proceedings. The district court erred in restraining the arbitration proceedings here. *Signal-Stat Corporation* v. *U. E. Workers of America*, 235 F.

2d 298 (2d Cir., 1956) *cert. den.*, 77 S. Ct. 1293 (1957); *Donahue* v. *Susquehanna Collieries Company*, 138 2d 3 (3d Cir., 1943); *Wilson & Company* v. *Fremont Cake & Meal Company*, 77 F. Supp. 364 (Neb., 1948).

Moreover, while section 1 of the Act excludes "contracts of employment of seamen, railroad workers, or any other class of workers engaged in foreign or interstate commerce," the record does not show that respondent comes within the exception. This Court specifically abstained from passing upon the further question of this exception in the *Bernhardt* case. It has been pointed out that the term "involving commerce" may be read as synonymous with "affecting commerce" while the term "engaged in commerce" should be given its most narrow technical meaning. *Tenney Engineering, Inc.* v. *United Electrical Workers Local 437*, 207 Fed. 2d 450 (3d Cir., 1953); *Local 205, etc.* v. *General Electric Company*, 233 Fed. 2d 85, 97-100 (1st Cir., 1956); Cox, "Grievance Arbitration in the Federal Courts," 67 Harv. L. Rev. 591, 599 (1954).

2. The decision of the court below conflicts with the federal policy favoring the enforcement of arbitration provisions in employment contracts. In *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448, 77 S. Ct. 912 (1957), holding that section 301 of the Labor Management Relations Act of 1947 not only gives federal district courts jurisdiction over controversies involving labor contracts in industries affecting commerce but also authorizes federal courts to fashion a body of federal law to enforce such contracts, and in particular their arbitration provisions, this Court noted that "the Congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes * * * [is] clear." The policy favoring arbitration of labor contract disputes is manifested in the rule that where an employee brings an individual judicial action on the contract, he is required to show that he

has exhausted his remedies under the contract before seeking judicial intervention. Cox, "Rights Under a Labor Agreement," 69 Harv. L. Rev. 601, 647-8 (1956); *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653, 73 S. Ct. 906 (1953).

3. The Court of Appeals, by misinterpreting this Court's decision in *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437, 75 S. Ct. 489 (1955), ignored or misapplied applicable state law requiring arbitration of the present wage dispute. The Court of Appeals, quoting from the *Westinghouse* case to the effect that "employees have always been able to enforce their individual rights in the state courts", concluded that respondent here had a right to bring judicial proceedings for back wages and was not bound by the arbitration clause. The *Westinghouse* case merely held that a union could not sue in the federal courts to enforce the individual grievance of one of its members. There is nothing in the *Westinghouse* case that prompts the conclusion that the individual employee is not bound by the arbitration provisions of the collective bargaining contract. It has been recognized that that contract may form the basis for the individual employment contract. *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653, 73 S. Ct. 906 (1953); Burstein, "Enforcement of Collective Agreements by the Courts", 6 N. Y. U. Conf. on Labor 31 (1953); Gregory, "The Collective Bargaining Agreement: Its Nature and Scope", 1949 Wash. U. L. Q. 3; Lenhoff, "The Present Status of Collective Contracts in the American Legal System", 39 Mich. L. Rev. 1109 (1941).

Assuming the inapplicability of the United States Arbitration Act, the legal issues raised here are to be governed by the law of the State of Indiana. *Bernhardt* v. *Polygraphic Company of America*, 350 U. S. 198, 76 S. Ct. 273 (1956); *Transcontinental & Western Air, Inc.* v. *Koppal*,

345 U. S. 653, 73 S. Ct. 906 (1953). Neither court below specified as to whether its decision was on the basis of Indiana law. The opinion of the Court of Appeals, predicated upon the *Westinghouse* case, appears to be based on that court's views as to the interpretation of the contract in question. The contract specifies that "any dispute, controversy or question arising under this agreement which cannot be settled by discussion and negotiation between the parties shall be submitted to arbitration." Respondent's claim for back wages is based upon that contract (App. R. 2). Basic principles of contract law preclude a party from ignoring the arbitration provisions of a contract when he relies upon the wage and hour provisions of the same contract as the basis for his action. Moreover, individual grievances relating to the payment of wages are always held to be subject to arbitration provisions in collective bargaining agreements. *P. S. Thorsen & Co., Inc.* v. *Neves*, 179 Misc. 11, 37 N. Y. S. 2nd 113; *Microflex Products Co., Inc.* v. *Rosenthal*, 80 N. Y. S. 2nd 788; *Jones* v. *Mississippi Valley Barge Line Co.*, 98 F. Supp. 787. In each of these cases, the courts stayed judicial proceedings commenced by the employee to recover wages in order that arbitration proceedings be concluded.

Indiana has declared that it favors the process of arbitration and it accords to an award the status of a judgment of a court. *Smith* v. *Stewart*, 5 Ind. 220 (1854); *Fargo* v. *Reighard*, 13 Ind. App. 39, 39 N. E. 888 (1895). Although the Indiana statute, Burns Indiana Statutes Annotated (1946 Replacement Volume) § 3-201, applies to existing disputes only, the statute expresses a public policy favoring arbitration and it is cumulative to the common law. *Kelley* v. *Adams*, 120 Ind. 340, 342, 22 N. E. 317 (1889); *Webb* v. *Zeller*, 70 Ind. 408, 410 (1880); *Miller* v. *Goodwine*, 29 Ind. 46, 47 (1867). At common law, an agreement whereby the parties bind themselves to submit a future dispute to arbi-

tration is not illegal. *Supreme Council of the Order of Chosen Friends* v. *Forsinger*, 125 Ind. 52, 55, 25 N. E. 129 (1890); *Maitland* v. *Reed*, 37 Ind. App. 469, 77 N. E. 290 (1905). Although the parties to a common arbitration may revoke their submission at any time prior to the rendering of an award, *Grand Rapids & I. R. Co.* v. *Jaqua*, 66 Ind. App. 113, 115 N. E. 73 (1917), the right to revoke is subject to ordinary principles of contract law and revocation is permissible only in cases where the promise to arbitrate is not supported by consideration. If the arbitration clause is part of the consideration of the contract as a whole, as it was in the present case, as opposed to a separate agreement to arbitrate, then under Indiana law it is clearly not revocable. *Memphis Trust Co.* v. *Brown-Ketchum Iron Works*, 166 Fed. 398 (6th Cir., 1909); *Lake Michigan Water Company* v. *U. S. Fidelity Co.*, 70 Ind. App. 537, 123 N. E. 703 (1919); *Maitland* v. *Reed*, 37 Ind. App. 469, 77 N. E. 290 (1905).

The Indiana authorities are similar to Missouri cases discussed in a recent decision of this Court. In *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653 (1953), the employee had been employed in accordance with the terms of a collective bargaining agreement which provided for a specified grievance procedure culminating in arbitration. The employee did not pursue the procedure outlined in the collective contract but instead brought suit in the federal district court, claiming diversity of citizenship and seeking damages for wrongful discharge. This Court held that the case should be dismissed, stating at page 660:

> "Under the law of Missouri, as shown above, respondent was required to show exhaustion of administrative remedies under his employment contract in order to sustain his cause of acton."

CONCLUSION.

This case presents for initial consideration by this Court the applicability of the Arbitration Act to, and the impact of federal policy in favor of arbitration provisions in, a collective bargaining agreement, which has been made the basis of litigation brought by an employee against his employer.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

STANFORD CLINTON,
ROBERT A. SPRECHER,
CHARLES LEVIN,
Counsel for Petitioner.

April 23, 1958.

APPENDIX.

1. Statutory Provisions Cited and Quoted.

United States Arbitration Act, 9 U. S. C. § 1-3.

Section 1 defines "commerce" as:

> "* * * commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

Section 2 provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Section 3 provides:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties

stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

SECTION 301 LABOR MANAGEMENT RELATIONS ACT, 29 U. S. C. § 185.

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties * * *."

BURNS INDIANA STATUTES ANNOTATED (1946 REPLACEMENT VOLUME).

"All persons * * * may, by an instrument in writing, submit to the arbitration or umpirage of any person or persons, to be by them mutually chosen, any controversy existing between them which might be the subject of a suit at law * * *."

2. Opinion of Court of Appeals.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 12108. September Term, 1957—January Session, 1958.

Richard Kosley,
Plaintiff-Appellee,
v.
Goldblatt Bros., Inc., an Illinois corporation,
Defendant-Appellant.

} Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

January 28, 1958.

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* This is an appeal by defendant from a restraining order entered by the district court in a diversity suit brought by plaintiff, a citizen of Indiana, against defendant, an Illinois corporation authorized to do business in Indiana.

The complaint, filed September 15, 1956, in addition to showing diversity of citizenship, alleges that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000. It sets forth a cause of action for a balance due on account of wages earned by plaintiff while employed as an operating engineer by defendant in its Hammond, Indiana, retail department store in the period from July 1, 1947 to October 29, 1955, as well as a penalty alleged to have accrued against defendant by virtue of its

refusal to pay said wages on demand, pursuant to Indiana law. A claim for reasonable attorneys' fees is also contained in the complaint.

Defendant's answer to the complaint, filed October 9, 1956, consists of admissions and also categorical denials that plaintiff was employed by it as alleged, that it agreed to pay an hourly rate at one and one-half times the regular rate for hours worked in excess of 40 hours per week, as alleged, that defendant is indebted as charged, that plaintiff demanded payment, that the wages claimed are wholly due and unpaid, that the statutory penalty accrued and that it was necessary for plaintiff to employ an attorney to collect said wages. The answer affirmatively sets up a defense of payment and also that, if plaintiff did perform the services in excess of 48 (*sic*) hours per week, he did so voluntarily and against the direction of defendant's management. The answer also pleaded the bar of the statute of limitations.

On May 24, 1957, plaintiff filed a petition which, *inter alia*, stated that the wages for which he had sued were "due by various contracts" between the International Union of Operating Engineers, Local 846 and defendant, of which union plaintiff was a member, and that defendant had notified plaintiff's attorney that it had resorted to the arbitration proceeding authorized by "a contract entered into by the International Union of Operating Engineers, Local 846, and Goldblatt Bros., Inc." Plaintiff prayed that defendant be restrained from any further proceedings in said arbitration. The district court received evidence, both oral and written, at a hearing on said petition. It entered such a restraining order and this appeal followed. Among other things, it appeared from the evidence that plaintiff was discharged November 1, 1955. As plaintiff's exhibits, the court received in evidence a series of agree-

ments between defendant, as employer, and Local 846, covering the relevant period of time.

The agreement, in effect from July 25, 1955 and extending to July 24, 1958, *inter alia*, establishes the union as the collective bargaining agency for all employees of the company engaged in the operating of all boilers, engines, etc., fixes the hourly wages of operating engineers, a regular work day of 8 hours and a work week of 40 hours, and provides that overtime shall be paid at an hourly rate of time and one-half. It also makes provision for time to eat and for vacations and holidays, and specifies the duties to be performed by the engineers. Specifically, it provides:

> "Article I.
>
> "That they shall keep the machinery under their charge in good running order and do all temporary repairs."

Article VIII provides:

> "During the term of this agreement there shall be no strikes, lockouts, stoppages or the use of any form of economic coercion by either of the parties hereto."

Article IX provides:

> "It is further mutually agreed by and between said parties:
>
> 1. That during the life of this agreement there shall be no further demands made upon either party.
> 2. That any dispute, controversy or question arising under this agreement which cannot be settled by discussion and negotiation between the parties shall be submitted to arbitration. Each party hereto shall select one arbitrator and the two shall select a third. * * *"[1]

1. Earlier agreements in the series contained provisions that the engineers were to make necessary repairs in maintaining their equipment. Common to all contracts was an arbitration clause similar to that contained in the 1955 agreement.

In this court, defendant argues (1) that the Supreme Court of the United States has held:

> "* * * that Section 301 of the Labor Management Relations Act of 1947 expresses a federal policy in favor of the enforcement of agreements to arbitrate grievance disputes such as the one involved in the present case. Section 3 of the United States Arbitration Act requires that federal courts stay judicial proceedings until arbitration proceedings are completed. In view of this overwhelming expression of congressional policy in favor of arbitration, the federal district court clearly erred in restraining arbitration proceedings in the present case."

It also argues (2) that ordinary principles

> "* * * of contract law applicable in the State of Indiana hold that the arbitration provision in a contract is binding upon parties thereto because it constitutes consideration for the wage and hour and other provisions in the same contract, that a party may not rely on parts of a contract and ignore other parts of the same contract, and that the arbitration agreement is a condition precedent to suing upon the contract and until the arbitration remedies provided in the contract are exhausted no judicial proceeding will lie."

Plaintiff disclaims any intention of basing his suit on section 301. He relies upon the allegations of his complaint showing diversity of citizenship and the statutory amount of damages sought.

Furthermore he contends that the provision for arbitration in the contract between the union and defendant does "not cover a claim by an individual employee for past due wages." We agree with this contention. An employee has always had a right to bring suit in a court to recover wages claimed to be owing him from his employer. As the court said in *Association of Employees* v. *Westinghouse Corp.*, 348 U. S. 437, 460: "The employees have always been able to enforce their individual rights

in the state courts." Such an action is based upon a hiring contract between the employer and the employee. While the contract between the employees' union and the employer may determine the rate of wages of the employee, the latter's right of action is not superseded by the employer-union agreement. An employee may enforce his claim for back wages by suing in a state court, or in a federal court where there is present diversity of citizenship and the required amount is involved.

Moreover, while we recognize that the arbitration provisions here in question must be given effect in a proper case, we emphasize that the subject matter of such a proceeding is clearly defined by the contract itself, and, as so defined, it does not include an individual claim of an employee for wages due. The arbitration machinery is to operate on any dispute, controversy or question arising under the agreement, which cannot be settled by discussion and negotiation between the parties. This provision follows an undertaking by the parties that there shall be no strikes, lockouts, stoppages, or the use of any form of economic coercion by either party. Arbitration as here envisioned is a method of settling, without court action, matters pertaining to working conditions, wage rate schedules, the right to vacations, etc., which were it not for the discussions, negotiations and arbitrations provided by the contract, would very likely result in economic coercion by either party.[2] Unlike such disagreements, which,

2. In some of the agreements between the union and the employer, appears a provision, known as section 9, giving the employer the right to discharge an employee for just cause, which is defined as dishonesty, drunkenness, absenteeism, insubordination, theft and inefficiency. While it appears from the evidence that plaintiff was discharged, no question is raised by the complaint or answer in regard to whether the discharge was justified. However, if the right to discharge plaintiff were contested by him, that might be an example of where arbitration would be available. Such a situation is basically different from the enforcement of his claim for wages due him from his employer.

if not resolved in the manner set forth in the contract, would probably affect the entire business of the employer and the work of many or all employees, a single employee's individual claim for wages earned by him is a matter for his individual concern which historically he has a right to submit to a court of law for adjudication upon the evidence submitted in an orderly judicial trial. The dispute, controversy or question which defendant wishes to settle by arbitration is that reflected in the complaint of the plaintiff and the answer of the defendant. Such is the action which plaintiff properly brought in the district court. It was the court's traditional jurisdiction over such a case that it was protecting by its restraining order. Such defenses as the bar of the statute of limitations which can be adequately considered only by a tribunal versed in the law were never intended by the parties to the contract to be decided by arbitration.

Accordingly we affirm the district court's order.

ORDER AFFIRMED.

3. Judgment of Court of Appeals.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Tuesday, January 28th, 1958.

Before:

Hon. J. Earl Major, Circuit Judge,
Hon. Philip J. Finnegan, Circuit Judge,
Hon. Elmer J. Schnackenberg, Circuit Judge.

Richard Kosley,
Plaintiff-Appellee,
No. 12108 *vs.*
Goldblatt Bros., Inc., an Illinois corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED with costs.

4. Order Denying Rehearing.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Thursday, February 20, 1958.

Before:

Hon. J. Earl Major, Circuit Judge,
Hon. Philip J. Finnegan, Circuit Judge,
Hon. Elmer J. Schnackenberg, Circuit Judge.

Richard Kosley,
Plaintiff-Appellee,
No. 12108 *vs.*
Goldblatt Bros., a corporation,
Defendant-Appellant.

} Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

It Is Ordered by the Court that appellant's petition for rehearing in the above-entitled cause be, and the same is hereby, DENIED.

Office - Supreme Court, U.S.
FILED
MAY 23 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1957.

No. 950

GOLDBLATT BROS., INC.,
An Illinois Corporation,

Petitioner,
(Defendant Appellant),

vs.

RICHARD KOSLEY,

Respondent,
(Plaintiff Appellee).

Brief In Opposition To Petition For Writ Of Certiorari.

EDMUND C. SCHROER,
5217 Hohman Avenue,
Hammond, Indiana,
Counsel for Respondent.

GEORGE KOHL,
5129 Hohman Avenue,
Hammond, Indiana,
Of Counsel.

Midwest Law Printing Co., - 326 N. Michigan Ave., Chicago.
Telephone: Financial 6-3988

INDEX.

	PAGE
Opinions below	2
Jurisdiction	2
Questions presented	3
Statutes involved	3
Statement	4
Argument	6
Conclusion	11
Appendix	1a

CITATIONS.

Cases:

American Locomotive Company v. Chemical Research Corp. (CCA Mich.) 171 Fed. 2d 115 (1948) ... 8

Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437 (1955) ... 7, 8

Bernhardt v. Polygraphic Company of America, Inc., 350 U.S. 198 (1956) ... 6, 8, 9, 10

Grand Rapids & Indiana Railway Company v. Jaqua, 66 Ind. App. 113, 115 N.E. 73 (1917) ... 10

Heritage v. State, ex rel Crim Auditor, et al, 43 Ind. App. 595, 88 N.E. 114 (1909) ... 10

La Nacional Platanera SCL v. North American Fruit and Steamship Corp. (CCA Ala.) 84 Fed. 2d 881 (1936) ... 8

Radiator Specialty Co. v. Cannon Mills, Inc. (CCA N.C.) 97 Fed. 2d 318 (1938) ... 8

Statutes:

United States Arbitration Act, 9 U.S.C. Section 1-3 ..... 6, 7

Section 301, Labor Management Relations Act, 29 U.S.C. Section 185 7

Burns Indiana Statutes Annotated (1952 Replacement Volume) Section 40-101 and 40-102 ..... 9, 1a

Burns Indiana Statutes Annotated (1946 Replacement Volume) Section 3-222 ..... 10, 1a

Miscellaneous:

6 C.J.S. Arbitration and Award, Section 34 (e) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1957.

No. 950

GOLDBLATT BROS., INC.,
An Illinois Corporation,

Petitioner,
(Defendant Appellant),

vs.

RICHARD KOSLEY,

Respondent,
(Plaintiff Appellee).

Brief In Opposition To Petition For Writ Of Certiorari.

Respondent respectfully submits that Petitioner has failed to advance any special and important reasons why this Court should grant the writ. In fact, Petitioner has failed to submit any reason for the granting of the writ as set forth in Rule 19 of the Court. The right of an employee to maintain a suit against his employer under Indiana law is a question of importance to the parties. It is not, however, the kind of question for which a writ of certiorari should be granted. The issue is determined on state law and the rulings below are in accordance with the applicable state decisions.

OPINIONS BELOW.

The opinion of the District Court (App. R. 32-35) is unreported. The opinion of the Court of Appeals, printed in the Appendix of Petitioner herein at page 13, is reported at 251 F. 2d 558.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 28, 1958 (Petitioner's App. p. 19). Rehearing was denied on February 20, 1958. (Petitioner's App. p. 20) The petition for writ of certiorari was filed on April 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED.

I.

Does Section 301 of the Labor Management Relation Act of 1947, 29 U.S.C. Section 185, and Section 3 of the United States Arbitration Act, 9 U.S.C. Section 3 apply in a diversity suit between an employee and employer for unpaid wages where there is no evidence of an industry affecting commerce being involved?

II.

Did the Federal District Court in the instant case, which was based upon diversity of citizenship, properly apply the Indiana law which states that arbitration agreements are revocable?

STATUTES INVOLVED.

The statutes cited by Petitioner are not applicable to the facts of the principal case as hereinafter shown. The only applicable statutes are Burns Indiana Statutes Annotated, 1952 Replacement Volume Sec. 40-101, 40-102 and Burns Indiana Statutes Annotated, 1946 Replacement Volume Sec. 3-222. They are printed in the appendix herein, infra page 1a.

STATEMENT.

Federal jurisdiction of Respondent's complaint against Petitioner is based upon diversity of citizenship and the requisite jurisdictional amount (Supp. R. p. 1a). The undisputed facts in the case at bar were that Respondent's complaint covered wages due him from Petitioner covering the period of July 1, 1947 to October 29, 1955 (App. R. 12). On October 9, 1956, Petitioner filed answer on the merits to Respondent's complaint and admitted the jurisdictional facts pleaded in the complaint (Supp. App. R. 4a).

Respondent notified Mr. Stevens, the business representative of the union, in 1945 and on several occasions after that of his wage demand, and was told to just keep going until it was straightened out (App. R. 13). Respondent notified Mr. Dall, the Petitioner's superintendent, in approximately 1949 or 1950, but no action was taken by Mr. Dall on Respondent's wage claim (App. R. 14).

On May 10, 1957, the petitioner, without notice to the Court or Respondent, (App. R. 15) appointed Mr. Stanford Clinton, the Petitioner's attorney of record in this case, as one of the arbitrators and, likewise without notice to the Court or Respondent, the union selected Frank Rebey (App. R. 6, 7). Respondent was given no opportunity or was he consulted on the appointment of these arbitrators (App. R. 14, 15). The Respondent first acquired notice through his attorney on or about May 21, 1957, that this matter was to be submitted to arbitration. The arbitrators and umpire had already been selected and the hearing was already scheduled for May 27, 1957 (App. R. 5, 6).

The International Union of Operating Engineers Local 846 did not consult Respondent, relative to the selection of the arbitrators (App. R. 15). Mr. Brookman, the president and business manager of the local union, testified that he was not familiar with the dispute between Respondent and Petitioner (App. R. 19, 20).

The union contract covers both the Hammond and Gary stores, and covers four employees (App. R. 24). Mr. Brookman did not notify Mr. Kosley when he learned of the proposed arbitration because Mr. Kosley is out of the union on a withdrawal card and the contract is between the union and Goldblatt Bros., Inc. and he thinks that the union should protect itself (App. R. 25). The union did not start the arbitration (App. R. 28).

ARGUMENT.

The judgment of the Circuit Court of Appeals is correct and is not in conflict with any applicable decision.

I.

Sections 1, 2 and 3 of The United States Arbitration Act, 9 U.S.C. Sections 1, 2 and 3 are not applicable to the present case. Section 1 of the act specifically excludes "contracts of employment of seamen, railroad workers, or any other class of workers engaged in foreign or interstate commerce" and this Court has interpreted the Section as follows:

"Since Section 3 is a part of the regulatory scheme, we can only assume that the 'agreement in writing' for arbitration referred to in Section 3 is the kind of agreement which Sections 1 and 2 have brought under federal regulation. There is no intimation or suggestion in the Committee Reports that Sections 1 and 2 cover a narrower field than Section 3. * * * We conclude that the stay provided in Section 3 reaches only those contracts covered by Sections 1 and 2." *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U.S. 198, 201, 202, (1956).

It might be further pointed out that there is no evidence in the record that the Petitioner is engaged in commerce or that the contract in question involves "a transaction involving commerce". Therefore, Section 2 of the United States Arbitration Act, 9 U.S.C. Section 2, does not apply to the case at bar. The United States Arbitration Act is specifically limited by Section 2 to "any maritime transaction or a contract evidencing a transaction involving commerce", and, therefore, it is readily appar-

ent that Sections 1, 2 and 3 of the United States Arbitration Act have no application to the present case.

Even if the transaction involved commerce, then Section 1 specifically excludes the case at bar as it is provided "nothing herein contained shall apply to contracts of employment of * * * any other class of workers engaged in foreign or interstate commerce."

It is also to be noted that Section 3 of the United States Arbitration Act, 9 U.S.C. Section 2 provides for a stay, "provided the applicant for the stay is not in default in proceeding with such arbitration." The Petitioner was in default in the proceeding for such arbitration by virtue of its filing answer on the merits of the case without raising any question of arbitration, and further by virtue of its inaction for a period of several years after notice of Respondent's claim and for a period of some seven months after filing answer before a request was made for arbitration.

II.

Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. Section 185 is inapplicable to the present case because Respondent has not sued under Section 301. The complaint of Respondent for unpaid wages in the present case was based upon diversity of citizenship and the statutory amount of damages. There is nothing in the record to indicate that "industry affecting commerce" is involved as required by Section 301. Further Section 301 applies only to suits "between an employer and a *labor organization.*" In the case of *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437 (1955) this Court held that a suit for unpaid wages by a union on behalf of certain employees was not a proper subject matter of a suit that could be brought under Section 301.

III.

The Federal Courts in a diversity case must look to state law to determine whether an arbitration provision will be enforceable. *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U.S. 198, 205, (1956).

The Petitioner waived its right to enforce the arbitration clause when the Petitioner and the union stood by for over seven years after notice of Respondent's claim (App. R. 13, 14). Further, it filed answer to Respondent's complaint and failed to take any action whatsoever on the arbitration until some seven months after answer was filed and thereby waived arbitration. *La Nacional Platanera SCL* v. *North American Fruit and Steamship Corp.*, (CCA Ala.) 84 Fed. 2d 881, 883, (1936); *American Locomotive Company* v. *Chemical Research Corp.*, (CCA Mich.) 171 Fed. 2d 115, 121 (1948); *Radiator Specialty Co.* v. *Cannon Mills, Inc.*, (CCA N.C.) 97 Fed. 2d 318, 319 (1938).

The arbitration clause in the present case provided, "It is agreed that there shall be no strikes, lockouts, stoppages, or the use of any economic coercion during the term of this agreement." Certainly it is apparent, where the above phrase appears in the first sentence of the arbitration clause, that the matters contemplated by the party to be subject to arbitration are "union matters" involving strikes, lockouts, stoppages, or the use of economic coercion during the term of this agreement, or as characterized by the union president, it is the "no strike clause", (App. R. 21) and would not cover a claim by an individual employee for past due wages.

"The employees have always been able to enforce their individual rights in state courts." *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, 460 (1955).

In Indiana, the individual has a statutory right to be paid by his employer and any contract to the contrary is void. The Indiana Statute further provides liquidated damages and attorney fees and expressly recognizes the right of an employee to bring a court action for the wages. (Burns Indiana Statutes Annotated, Section 40-101 and 40-102; App. at p. 1a)

Certainly the statutes recognize the policy within the State of Indiana of giving to every employee a distinct right to collect his own wages in the courts, regardless of what the collective bargaining agreement might provide.

The arbitration agreement was revocable under state law. It is well settled that in a diversity case the revocability of the arbitration agreement is to be determined by state law.

"• • • the federal court enforcing a state-created right in a diversity case is, • • • only another court of the State." *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U.S. 198, 203 (1956).

"If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in the ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by Ch. 1 Art. 12th, of the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need give their reasons for their results; the record of their proceedings is not as complete as it is in

a court trial; and judicial review of an award is more limited than judicial review of a trial." The court further stated at page 204; "There would in our judgment be a resultant discrimination if the parties suing on a Vermont cause of action in the federal court were remitted to arbitration, while those suing in the Vermont court could not be." *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U.S. 198, 203 (1956).

Generally the institution of a suit covering the same subject matter as that submitted to arbitration revokes the submission. 6 C.J.S. Arbitration and Award, Section 34 (e) and cases cited therein.

A common-law submission may be revoked at any time before the award is made, even though the agreement provides that the submission cannot be revoked. *Heritage* v. *State, ex rel Crim Auditor, et al*, 43 Ind. App. 595, p. 600, 88 N.E. 114 (1909); *Grand Rapids and Indiana Railway Company* v. *Jaqua*, 66 Ind. App. 113, 115 N.E. 73 (1917).

The attempted arbitration in the present case was not in compliance with the Indiana Statute, which provides as follows:

"If the subject-matter of any suit pending in any court might originally have been submitted to arbitration, the parties to such suit, their agent or attorney-at-law, may consent, by rule of court, to refer the matter in controversy to certain persons mutually chosen by them in open court." Burns Indiana Statutes Annotated (1946 Replacement Volume) Section 3-222.

Therefore, in the case at bar immediately upon filing the Respondent's complaint herein, the arbitration agreement, if we assume it covered the subject matter in dispute, was revoked. Further, Respondent expressly revoked any arbitration agreements at the hearing on his petition for restraining order. (App. R. 14)

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDMUND C. SCHROER,
Counsel for Respondent.

GEORGE KOHL,
Of Counsel.
May 22, 1958.

APPENDIX.

1. Statutory Provisions Cited and Quoted.

BURNS INDIANA STATUTES ANNOTATED (1952 Replacement Volume) Section 40-101, Acts 1933, Chapter 47, Section 1, p. 371 recognizes the individual right of an employee to be paid by his employer and states that "any contract to the contrary shall be void."

BURNS INDIANA STATUTES ANNOTATED (1952 Replacement Volume) Section 40-102, Acts 1933, Chapter 47, Section 2, p. 371 further provides for liquidated damages and attorney fees in the event that such payment is not made and states: " • • • *and said damages may be recovered in any court* having jurisdiction of a suit to recover the amount due to such employee." (our emphasis)

BURNS INDIANA STATUTES ANNOTATED (1946 Replacement Volume) Section 3-222, 2 R.S. 1852, Chapter 3, Section 22, p. 227 states: "If the subject-matter of any suit pending in any court might originally have been submitted to arbitration, the parties to such suit, their agent or attorney-at-law, may consent, by rule of court, to refer the matter in controversy to certain persons mutually chosen by them in open court."